TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 178

GULF FISHERIES COMPANY, APPELLANT,

vs.

JOHN L. DABBOUZET, DISTRICT AND COUNTY ATTORNEY OF GALVESTON COUNTY, TEXAS; D. B. MacINERNEY, SUBSTITUTED BY AGREEMENT

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS

FILED FEBRUARY 3, 1927

(28,442)

(32,443)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 876

GULF FISHERIES COMPANY, APPELLANT,

vs.

JOHN L. DARROUZET, DISTRICT AND COUNTY ATTORNEY OF GALVESTON COUNTY, TEXAS; D. B. MacINERNEY, SUBSTITUTED BY AGREEMENT

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 21, 1927

States, the greater portion of said fish being shipped outside of the State of Texas.

IV

That said fish when caught are not stored or warehoused in Texas, that said fish are not canned, treated or preserved, but are shipped in their natural state all over the United States and to various states other than Texas.

V

That the great bulk of said fish are sold before same are caught and before the same are imported into the United States and that none of said fish are held in store in the State of Texas for the purposes of sale, but are at all times moving in commerce, interstate or foreign.

VI

That the State of Texas has passed a law, known as Chapter 178 of the Laws passed by the Thirty-Ninth Legislature of the State of Texas, Article 10 of said law being as follows:

"There shall be and is hereby levied a tax of not less than one-fifth of one cent per pound on all fish, crabs and shrimp, whether from private or public waters, taken and sold or offered for sale in this State, and not less than two cents a barrel on all oysters, sold or offered for sale in this State whether from private or public beds, and offered for sale or shipment and not less than one-half a cent per pound on all turtles, and not less than twenty-five cents on each terrapin offered for sale and shipment. Such tax shall be paid under such rules and regulations as the Game, Fish and Oyster Commissioner shall prescribe. For all purposes mentioned in this title or section, a barrel of oysters shall be deemed and taken to consist of three boxes of [fol. 6] oysters in the shell; said boxes to be the following dimensions; ten inches wide by twenty inches long, and thirteen and one-half inches in depth. In filling such boxes for measurement, such oysters shall not be placed or deposited in such box in a way that will make them fill the box more than two and one half inches in the center above

the height of the box. Provided that two gallons of shucked oysters without their shells shall be considered and deemed by this Act as equal to one barrel of oysters in the shell. It is hereby specially provided that the title to the shells from which oysters are taken shall remain in the State and the Game, Fish and Oyster Commissioner is directed to handle, control or sell same as he may see fit. Provided such oyster shells shall not be sold for a lower price than twenty-five cents the cubic yard. All moneys and royalties collected under and by the provisions of this article shall be deposited by the Game, Fish and Oyster Commissioner to the credit of the fish and oyster fund, hereinafter provided for."

VII

That under said law, the State of Texas is trying to collect from plaintiff a tax of one fifth of one cent per pound on all fish handled by plaintiff, said tax being a tax on imports and a tax on interstate commerce and being in violation of the laws of the United States and in violation of the Constitution of the United States.

VIII

That Article 13 provides as follows:

"Any person who shall not pay or who shall refuse to pay the tax imposed on the taking and sale of fish, oysters, turtle, terrapin and shrimp, as imposed in Article 10 of this Act, or who shall not pay or shall refuse to pay the taxes established and fixed by the Game, Fish and Oyster Commissioner in Article 10 of this Act shall be deemed [fol. 7] guilty of a misdemeanor and on conviction shall be fined a sum not less than fifty ($50.00) dollars nor more than one hundred ($100.00) dollars, and if such person shall be a licensed fish dealer or fisherman or oysterman, his license as a fish dealer or fisherman shall be cancelled and not reissued for a period not to exceed three years."

IX

That Article 16 of said act requires every firm engaged in the business of wholesale dealer of fish to secure from the Game, Fish and Oyster Commissioner of Texas a license

for permission to engage in the occupation of wholesale fish dealer, and said act provides that for such license, the applicant shall pay one ($1.00) dollar for each one thousand pounds of fish handled by him, providing that should any firm or association do business without procuring license and paying the tax required by this Article, said wholesale fish dealer shall be guilty of misdemeanor and upon conviction shall be punished by a fine of not less than fifty ($50.00) dollars, nor more than two hundred ($200.00) dollars.

X

That said Sections of the Statute are unconstitutional and void, being conflicting with Article I, Section 10, Paragraph 10 of the Constitution of the United States, said article providing that no state shall levy a charge against importations, and in violation of Article I, Section 8, Paragraph 3, of the Constitution of the United States, which expressly grants to Congress the power to regulate commerce with foreign nations and the several states.

XI

Plaintiff respectfully represents that defendant is harassing plaintiff and is attempting to enforce said unconstitutional statute and is threatening to file suits against plaintiff, and each and all of plaintiff's employes and officers; that [fol. 8] said act of the State of Texas provides that each day of operation shall be a separate and distinct suit and defendant is threatening to file numerous and multitudinous suits against said officers and employes of plaintiff and against plaintiff, and that defendant is threatening and seeking to enforce the payment of said tax.

XII

That enforcement of said law against plaintiff would cause plaintiff irreparable damage and injury and would greatly damage plaintiff's business in that plaintiff is forced to compete with wholesale fish dealers in other states, who likewise import fish into the United States and that plaintiff cannot compete with said fish dealers and pay said tonnage tax and license tax and said tax on importations and

that the damage to plaintiff far exceeds the sum of Three Thousand ($3,000.00) Dollars.

XIII

Now, therefore, this plaintiff prays that the said John L. Darrouzet be cited to appear and answer this petition, and that said John L. Darrouzet, his agents, attorneys and other employes be immediately restrained from causing the plaintiff, its officials, agents, servants and employes to be arrested, and from taking any other action, or in any manner interfering with plaintiff or its business by reason of said law and for interlocutory injunction as aforesaid and upon final hearing of this application for permanent injunction, enjoining the said John L. Darrouzet, his agents, attorneys and employes from causing the plaintiff, its officers, agents, servants and employes to be arrested or from taking any other action, or in any manner interfering with plaintiff or its business, or attempting to collect any tax, by reason of said law, and for such other relief in law and in equity it may be entitled to."

Gulf Fisheries Company, by F. S. Thompson.

[fol. 9] *Duly sworn to by Frank Thompson. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

AGREEMENT AND ORDER FOR SUBSTITUTION OF PARTY DEFENDANT — Filed October 26, 1926

It is agreed by the parties to the above entitled and numbered cause that the name of D. B. MacInerney may be entered and substituted in lieu of John L. Darrouzet, County and District Attorney of Galveston County, Texas, the said D. B. MacInerney having succeeded the said John

L. Darrouzet, as County and District Attorney, of Galveston County, Texas, since the filing of this suit.

Stewart, Damiani & Harris, Attorneys for Gulf Fisheries Co. Dan Moody, Atty. General; C. A. Wheeler, Asst. Atty. Gen.; D. B. MacInerney, Attorneys for John L. Darrouzet and D. B. MacInerney.

The above agreement having been filed in this case and being brought to the attention of the Court, it is adjudged, ordered and decreed that D. B. MacInerney, County and District Attorney of Galveston County, Texas, be and hereby is substituted as defendant in this case.

J. C. Hutcheson, Jr., Judge.

[File endorsement omitted.]

[fol. 11] In United States District Court

[Title omitted]

First Amended Original Answer—Filed October 25, 1926

To the honorable judge of said court:

Now comes D. B. MacInerney, County Attorney of Galveston County, Texas, substituted by agreement for the original defendant, John L. Darrouzet, defendant in the above entitled and numbered cause, and without waiving his motion to dismiss the bill heretofore filed in this cause on the 18th day of June, A. D. 1926, but still insisting on same, with leave of the Court files this his first amended original answer in said cause, and says:

1

Defendant, D. B. MacInerney admits that he is the County Attorney of Galveston County, Texas.

2

The defendant admits that complainant herein is engaged in wholesale fish business in the City of Galveston, Gal-

veston County, Texas, and has obtained as required by the laws of the State of Texas, a wholesale fish dealer's license; that plaintiff operates a fishing fleet and that all its vessels are operated under the laws of the United States and fly the American flag; that all fish obtained by plaintiff for the purpose of sale are from foreign waters; that said fish are composed largely of Red Snappers; but defendant avers that after said fish are caught in said waters, they [fol. 12] are brought into the City of Galveston, Galveston County, Texas, by the plaintiff on vessels belonging to the plaintiff and removed into plaintiff's place of business situated in the City of Galveston, Galveston County, Texas.

3

That upon being removed into complainant's place of business situated in the City of Galveston, Galveston County, Texas, all of said fish are washed and approximately 75 per cent are beheaded and gutted and from 7 to 10 per cent are gutted and gilled with heads left on, and the remainder are sold without beheading or removing gills or entrails; that all of said fish are iced after being brought into plaintiff's place of business in Galveston, Galveston County, Texas, and are put with ice in barrels for shipment and sale in filling orders, except 15 or 20 per cent. which are sold within the City of Galveston; that about 75 per cent of the fish sold by plaintiff are sold and shipped to dealers in the State of Texas and about 25 per cent of said fish are shipped to States other than Texas by railway, express or by freight; that all of said fish are at plaintiff's place of business in the City of Galveston, Galveston County, Texas, after being unloaded from plaintiff's vessels washed and otherwise prepared for sale, and that said fish are not sold by plaintiff by boatload or as an entire catch of fish, but are broken up and sold in different amounts ranging from fifty pounds up, about 400 pounds being the average order and sale.

4

That plaintiff does not own said fish until same are caught and does not sell said fish until same are unloaded from plaintiff's boats at its place of business in Galveston,

Texas, and there weighed and washed and a large percentage thereof beheaded, gutted and gilled and changed from the state and condition in which they arrived and were unloaded at Galveston, Texas.

[fol. 13] 5

The defendant denies that Article 10, Article 13 and Article 16 of Chapter 178, Acts Regular Session, 39th Legislature of the State of Texas, is in conflict with Article 1, Section 10, Paragraph 10, of the Constitution of the United States, which provides that no State shall levy a charge on importation and denies that said articles violate Article 1, Section 8, paragraph 3 of the Constitution of the United States, which grants to Congress the exclusive power to regulate commerce with foreign nations and the several States.

6

The defendant denies that he, his agents and employes are harrassing the complainants herein, but avers that he is only attempting to perform his legal duty in the enforcement of the Criminal Statutes of the State of Texas.

7

The defendant denies that said fish caught by plaintiff and brought into the City of Galveston, Galveston County, Texas, and unloaded in complainant's place of business, constitute an import under the laws and the Constitution of the United States, and further avers that if said fish brought to Galveston in plaintiff's vessels are imports that they did and do lose their status and identity as such by reason of the fact that the plaintiff does not sell such fish in the same form and manner and package in which said fish are brought into Galveston, Texas, but that the catch of fish brought into Galveston, Texas, by plaintiff are changed in form, manner and package and are sold in different packages without regard to the size, condition and manner in which they were received at Galveston, Texas, and that said fish in being unloaded in plaintiff's place of business in the City of Galveston, Galveston County, Texas, are there so acted upon as to become mixed and mingled

with the general mass of property within the State of Texas.

[fol. 14] 8

The defendant denies that the enforcement of the statutes of the State of Texas and the collection of the tax sought to be enjoined by plaintiff would thereby cause plaintiff irreparable damage and injury to any extent and specifically denies that such damages and injury amounts to more than the amount due the State of Texas under the law, which amount is considerably less than $3,000.00.

9

Wherefore, premises considered, the defendant prays that the temporary restraining order heretofore granted be discharged and that the interlocutory injunction requested by plaintiff be denied; that the bill of complaint of complainant be dismissed and that upon hearing hereof plaintiff be denied any relief in equity, defendant further prays that he be dismissed with his reasonable costs in this behalf sustained.

D. B. MacInerney, Defendant, County Attorney, Galveston County, Texas. Dan Moody, Attorney General. E. A. Wheeler, Assistant Attorney General. D. B. MacInerney, County Attorney. ——— ———, Assistant County Attorney.

Duly sworn to by D. B. MacInerney. Jurat omitted in printing.

[fols. 15-22] [File endorsement omitted.]

[fol. 23] In United States District Court

[Title omitted]

Statement of Evidence—Filed January 26, 1927

The plaintiff, Gulf Fisheries Company, herewith files in the District Court of the United States for the Southern District of Texas, at Galveston, the following as a state-

ment of the evidence in the cause, it being an agreed statement of facts of the parties in this case.

Stewart, Damiani & Harris, Attys. for Gulf Fisheries Co.

We, the parties to the above styled and numbered cause, whose names are signed hereto, being all the parties to this suit, hereby agree that the following is a true and correct statement of the facts in this cause:

1

The Gulf Fisheries Company is a corporation organized under the laws of the State of New York with permit to do business in the State of Texas, and with its place of business in Galveston, Galveston County, Texas, and the defendant, D. B. MacInerney, substituted by agreement for John L. Darrouzet, is County and District Attorney of Galveston County, Texas, and is a resident of Galveston County, Texas.

2

The plaintiff is engaged in the business of catching fish on its own vessels, some of said fish being caught at open sea, but most of the fish being caught in foreign waters, and bringing said fish into Galveston, Texas, on the same boats that said fish are caught, said fish consisting mostly of Red Snappers and other fish.

[fol. 24]

3

The said fish are caught and obtained by plaintiff in the following manner, to-wit: plaintiff owns a fleet of fishing vessels equipped for the purpose of catching fish handled by the plaintiff. Plaintiff employs fishermen to operate said vessels and to catch said fish. The fishermen are paid on the following basis: after deducting the towage bill paid, and oil and fuel, the ship takes forty per cent of the total value of the catch then from the balance is deducted all other expenses of the ship, including supplies, groceries, ice and other expenses of like character, and the balance is then distributed among the crew as follows:

If there are nine men, the balance is divided into ten shares.

The Captain gets one and one-half shares.

The First hand gets one and one-quarter shares, and the Cook gets one and one-quarter shares, unless otherwise agreed by the crew. This money is paid on the above plan by the plaintiff at Galveston as soon as the fish are unloaded and weighed. This value is determined by the gross weight of the fish before anything is done to them, just as they are unloaded from the boats at Galveston.

4

That after catching said fish as aforesaid, plaintiff brings said fish on its vessels to the port of Galveston, where it is accorded wharf privileges by the Galveston Wharf Company, such as are necessary to the conduct of business in unloading fish from the boats and loading same on express cars, and such space as is necessary in handling the office work incident thereto. In the handling of said fish, plaintiff has several large bins or ice boxes for the storage and handling and re-icing of said fish.

5

That said fish are unloaded by the plaintiff from the ves- [fol. 25] sels of plaintiff in Galveston, Texas, and are at said place weighed and washed. All the fish are at said place weighed, and washed and approximately seventy-five per cent are beheaded and gutted, and from seven to ten per cent are gutted and gilled with heads left on, and the remainder are sold without beheading or removing gills or entrails; said fish are re-iced at said place and are put with ice in barrels for shipment in filling orders, except fifteen or twenty per cent which are sold within the City of Galveston to wholesale dealers. Said fish are not cooked or treated in any manner, but are shipped to purchasers in the same condition as when caught excepting that said fish are washed, and the heads and entrails are removed as before stated and then such fish with fresh ice are placed loose in barrels and so shipped. There are many wholesale dealers in fish in Texas whose business is the buying of fish from the Gulf Fisheries Company and similar concerns and reselling same at retail.

6

After said fish are brought into Galveston as aforesaid, they are immediately re iced to keep said fish from spoiling and handled as above set forth.

7

About twenty five per cent of fish brought in are shipped to states other than Texas by railway express and by freight.

8

That plaintiffs has several large iceboxes on the wharf where fish are unloaded; that none of said fish are stored in cold storage plants in the city, but are shipped out of Galveston—fast as said fish can be re iced, washed and handled, as above stated, and loaded in express cars and that practically all of said fish are shipped the day said fish are unloaded from the boats on which they are brought into Galveston. On a few occasions fish have been held in said [fol. 26] ice boxes on plaintiff's premises for more than forty-eight hours, but this is an exception to the rule.

9

Plaintiff sells no fish at retail at its place of business or elsewhere, but sells all fish in the manner and place above stated in large quantities to such people as wholesale dealers in quantities of fifty pounds and up, about four hundred pounds being the average order.

10

Plaintiff has on the demand of the Game, Fish and Oyster Commissioner of the State of Texas, taken out a wholesale fish dealers' license, but has refused to pay the tax of One Dollar ($1.00) per thousand pounds of fish sold by plaintiff at the place and in the manner above stated, this tax covering fish sent to other states as well as fish sold in Texas.

11

It is agreed by the plaintiff and defendant that the Revised Criminal Statutes published by the authorities of the

State of Texas may be accepted as stating the laws of Texas on the controversy.

12

The defendant herein will prosecute all plaintiff's agents and employees unless the tax of $1.00 per thousand pounds of fish sold is paid, said license being $1.00 for each thousand pounds of fish handled by the plaintiff.

13

It is agreed by defendant that plaintiff will not be required to pay the tax of one fifth of one cent per pound on all fish caught and handled in the manner above described by plaintiff.

14

Defendant has already filed criminal proceedings against Frank Thompson, one of plaintiff's employees, for failure [fol. 27] to pay said wholesale dealers' tax of $1.00 for each thousand pounds of fish sold and handled by plaintiff in the manner above stated, and will continue to prosecute any and all of plaintiff's employees responsible for the failure to pay said tax of $1.00 for each thousand pounds of fish sold and handled by plaintiff in the manner above stated, unless said tax is paid or unless this court now trying this case shall issue its injunction restraining defendant from such action. Said complaint reads as follows:

"In the name and by the authority of the State of Texas: Before me, the undersigned authority, on this day personally appeared T. E. Sammons, who, after being by me duly sworn, on oath deposes and says: That heretofore, to-wit: on or about the 10th day of June, A. D., 1926, and before the making and filing of this complaint, in the County of Galveston, and State of Texas, F. S. Thompson, did then and there unlawfully fail and refuse to pay wholesale dealers' tax on fish sold and shipped within the State of Texas, as provided for in article 936 of the Revised Statutes of Texas, against the peace and dignity of the State.

(Signed) T. E. Sammons, Complainant.

Subscribed and sworn to before me this the 10th day of June, A. D. 1926. (Signed) John Harris, Justice of the Peace, Precinct No. 2, Galveston County, Texas."

15

Plaintiff sells its fish in competition with other fish companies in Texas and in other states and the tax of other states is not the same in amount as the State of Texas, it being greater in some and less in others.

16

Plaintiff sells no fish except those caught and handled in the manner above described and has no other place of business than the place where plaintiff transacts business at Galveston, Galveston County, Texas.

[fol. 28] 17

All fish sold by plaintiff are sold on orders received by plaintiff at its office in Galveston County, Texas. Photographs of plaintiffs' place of business may be introduced in evidence.

About 900,000 pounds of fish caught by plaintiff yearly, value about $72,000.00 yearly.

Gulf Fisheries Company, by Brantly Harris, as Attorney. D. B. MacInerney, County Attorney, Galveston County. Dan Moody, Attorney General of Texas. C. A. Wheeler, Ass't Attorney General.

[fol. 29] Art. 936.—Wholesale Dealer's License

Any individual, firm or corporation engaged in, or who may engage in the business of a wholesale dealer in fish and oysters shall secure from the Game, Fish and Oyster Commissioner, or one of his deputies, a license granting such individual, firm or corporation, permission to engage in said occupation for one year. For the purpose of obtaining this license, the applicant desiring same must make written application to the Game, Fish and Oyster Commissioner, or one of his deputies, in which he (the applicant) shall set forth under oath, if required, that he is a citizen of the United States by birth, or not being so, shall state that he

has been granted, full naturalization papers, and by what court and at what time they were granted. Where a corporation applying for permit to conduct a wholesale business in fish, oysters, or other marine products as mentioned, contains foreigners, it shall conform to the foregoing provision as applied to individual applicants. He shall also agree that because of the privilege which he applied for from the State of Texas, that all products handled by him shall, at all times, be subject to the inspection of the Game, Fish and Oyster Commissioner, or any of his deputies; and in said application he shall authorize said Commissioner or any of his deputies to enter his place of business, or any place where he may have such products stored, and inspect same. He shall agree to keep correct record of all fish, oysters, shrimp and other taxed marine life handled by him under this law, in a book to be furnished by the Game, Fish and Oyster Commissioner; and further, that failure on his part to keep a correct record shall be grounds for the forfeiture of his license granted him under the application aforesaid. This application, having been duly executed and delivered to the Game, Fish and Oyster Commissioner, or any of his deputies, together with a fee of ten ($10.00) dollars for same, it shall be the duty of the Game, Fish and Oyster Commissioner, or his deputy to issue to the applicant [fol. 30] a license to engage in the business set forth in the application. Said license must be signed by the Game, Fish and Oyster Commissioner, or one of his deputies, stamped with the seal of his office, and state the name of the licensee, place of business and the kind of license applied for and shall be good for twelve months following the date of issuance. For such license, the applicant shall pay one ($1.00) Dollar for each one thousand pounds of fish, shrimp and crabs handled by him, and a tax of one cent per barrel on oysters handled by him, which tax shall be paid monthly, the tax to be paid on the first of each month, which may be due upon said product handled during the preceding month as shown by the record books, hereinbefore mentioned. And any person, firm or corporation, or association of persons, or any officer, agent or employe of any company, corporation or association of persons who shall engage in the business of a wholesale dealer in fish and oysters or either, without procuring a license to follow said business, or with-

out paying the tax and fee required by this article, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than fifty ($50.00) dollars, nor more than two hundred ($200.00) dollars; and each day such business may be engaged in (in) violation of this article, shall constitute a separate offense, and upon conviction of pursuing said occupation without payment of the tax and fee required by law, or for any other violation of the game, fish and oyster law, the license of such dealer, shall be forfeited. A wholesale dealer, in the meaning and definition of this chapter, is any person, corporation or firm or partnership engaged in the business of buying and selling or handling for shipment, fish, oysters, shrimp, turtle, terrapin, crabs, clams, lobsters or other commercial marine life, in quantities of ten pounds or more to any customer during the same day, or whose daily sales, or whose sales for any one day, amount to more than the aggregate of one hundred pounds of above mentioned marine products.

[fol. 31] Judge's certificate to foregoing statement of evidence omitted in printing.

[File endorsement omitted.]

[fol. 32] In United States District Court

[Title omitted]

Order Denying Injunction—Filed December 17, 1926

This matter having been duly considered by the Court composed of Judge Rufus E. Foster, of the Circuit Court of Appeals and Judges Duval West and J. C. Hutcheson, Jr., they being of the opinion that the injunction should be denied, it is so ordered.

Houston, Texas, December 17, 1926.

Rufus E. Foster, Duval West, J. C. Hutcheson, Jr., Judges.

[File endorsement omitted.]

[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

DECREE—Filed December 17, 1926

This cause coming on for final hearing at New Orleans, Louisiana, in the United States District Court Room on the 29th day of October, A. D. 1926, same being at this term of court, and Joseph C. Hutcheson, Jr., United States District Judge for the Southern District of Texas, having called to his assistance, conformable to the provisions of Section 266 of the Judicial Code, Rufus E. Foster, United States Circuit Judge for the Fifth Circuit, and Duval West, United States District Judge for the Western District of Texas, came the Court by its said members assembled, and also came the parties, plaintiff and defendants, by their respective counsel, the defendant D. B. MacInerney, County Attorney, successor in office as such to the defendant, John L. Darrouzet, County Attorney, having been substituted by agreement for the said original defendant, John L. Darrouzet; and the court having considered said cause upon an agreed statement of facts heretofore filed herein, together with the pleadings and the argument of counsel, is of the opinion and on this the 28th day of December, 1926, so finds that the plaintiff is not entitled to recover herein, and that the temporary injunction heretofore issued herein in this cause should be in all things dissolved and that the injunction prayed for should be denied.

It is accordingly ordered, adjudged and decreed by the court that the injunction prayed for by plaintiff be and the same is hereby in all things denied.

[fol. 34] It is further ordered, adjudged and decreed that plaintiff recover nothing herein and that the defendants go hence without day and recover their costs against the plaintiff, for which let execution issue in favor of the officers of this court.

To which said action and ruling of the court counsel for the plaintiff in open court duly excepted and gave notice that they would in due time apply to this court to be allowed

an appeal from this said judgment and decree to the Honorable Supreme Court of the United States.

Rufus E. Foster, by J. C. H., Jr. Duval West, by J. C. H., Jr. J. C. Hutcheson, Jr.

[File endorsement omitted.]

[fol. 35] In United States District Court

[Title omitted]

Before Foster, Circuit Judge, and West and Hutcheson, District Judges

Opinion—Filed December 28, 1926

Hutcheson, J.:

This is a suit before a three judge court brought to restrain the County Attorney and the authorities of the State of Texas from prosecuting the plaintiff for pursuing the business of handling fish without securing a wholesale dealers' license, as provided by the statutes of Texas, and paying the tax on products handled by them as such wholesale dealers.

The case is submitted on an agreed statement as follows:

The Gulf Fisheries Company, plaintiff, is a corporation organized under the laws of the State of New York with a permit to do business in the State of Texas, and with its place of business in Galveston.

The plaintiff is engaged in the business of catching fish on its own vessels, some of said fish being caught at open sea, but most of the fish being caught in foreign waters and bringing said fish into Galveston, Texas, on the same boats that said fish are caught, said fish consisting mostly of Red Snappers and other fish.

That after catching said fish as aforesaid, plaintiff brings said fish on its vessels to the port of Galveston, where it is accorded wharf privileges by the Galveston Wharf Company such as are necessary to the conduct of business in unloading fish from the boats and loading same on express cars, and such space as is necessary in handling the other

[fol. 36] work incident thereto. In the handling of said fish plaintiff has several large bins or ice boxes for the storage and handling and reicing of said fish.

That said fish are unloaded by the plaintiff from the vessels of plaintiff in Galveston, Texas, and are at said place weighed and washed. All the fish are at said place weighed and washed and approximately seventy five per cent are beheaded and gutted, and from seven to ten per cent are gutted and gilled with heads left on, and the remainder are sold without beheading or removing gills or entrails; said fish are re-iced at said place and are put with ice in barrels for shipments in filling orders, except fifteen or twenty per cent which are sold within the City of Galveston to wholesale dealers. Said fish are not cooked or treated in any manner, but are shipped to purchasers in the same condition as when caught excepting that said fish are washed and the heads and entrails are removed as before stated, and then such fish with fresh ice are placed loose in barrels and so shipped. There are many wholesale dealers in fish in Texas whose business is the buying of fish from the Gulf Fisheries Company and similar concerns and re-selling same at retail.

After said fish are brought into Galveston as aforesaid, they are immediately re-iced to keep said fish from spoiling and handled as above set forth.

About twenty five per cent of fish brought in are shipped to states other than Texas by railway express and by freight.

That plaintiff has several large ice boxes on the wharf where fish are unloaded; that none of said fish are stored in cold storage plants in the city, but are shipped out of Galveston as fast as said fish can be re-iced, washed and handled as above stated, and loaded in express cars, and that practically all of said fish are shipped the day said fish are unloaded from the boats on which they are brought into Galveston. On a few occasions fish have been held in said ice boxes on plaintiff's premises for more than forty [fol. 37] eight hours, but this is an exception to the rule.

Plaintiff sells no fish at retail at its place of business or elsewhere, but sells all fish in the manner and place above stated in large quantities to such persons as wholesale dealers in quantities of fifty pounds and up, about four hundred pounds being the average order.

Plaintiff has on the demand of the Game, Fish & Oyster Commissioner of the State of Texas taken out a wholesale fish dealer's license, but has refused to pay the tax of One Dollar per thousand pounds of fish sold by plaintiff at the place and in the manner above stated, this tax covering fish sent to other states as well as fish sold in Texas.

The defendant herein will prosecute all plaintiff's agents and employees unless the tax of $1.00 per thousand pounds of fish is paid, said license being $1.00 for each thousand pounds of fish handled by the plaintiff, and defendant has already filed criminal proceedings against one of the plaintiff's employees and will continue to do so until the tax is paid.

The tax imposed appears in Title 63 Game, Fish, Oysters, etc. of the Statutes of the State of Texas, a system of laws for the protection of fish and game. Among other provisions of the Title are Art. 3987 providing that, "For the better protection of the fish and oyster industry every person who may engage in the business of wholesale dealer shall procure from the Game, Fish & Oyster Commissioner a license. For the purpose of obtaining this license the applicant must agree that all products bought or sold or had for sale by him shall all be subject to inspection of the Game, Fish and Oyster Commissioner, and he shall authorize the Commissioner to enter his place of business at any time to inspect the same."

And Art. 3989 which provides that the application for the license having been duly executed and delivered to the Com- [fol. 38] missioner it shall then be the duty of the Commissioner if the application complies with the law, to issue a license, for which license the applicant shall pay a tax of One Dollar for each thousand pounds of fish handled by him. Failure to pay the tax authorizes the forfeiture of the license; and also it is provided that failure to pay the tax shall constitute a misdemeanor for which the person offending will be prosecuted and punished as provided by law.

Plaintiff defends against compliance with the law on the ground that the fish constitute imports; that the tax is a tax on imports, and therefore in contravention of Art. 1, Sec. 10 of the Constitution.

The defendant replies—

(1) That fish are not imports, because fish being ferae naturae are not the subject of private property, and there-

fore are not within the inhibitions of the invoked provision of the Constitution.

(2) That if the fish are in their nature imports, in this particular case they have become so mingled with the common mass of property in the State as to lose their character as such, and therefore their exemption, and

(3) That conceding them to be imports, the tax is levied and is necessary for inspection purposes to protect the fish and game, and therefore is levied under direct authority of the Constitution.

Considering these contentions in their order, we think as to the first contention it is sufficient to say that the Constitution prohibits taxes on imports; that these fish certainly are imports, that is, objects or things brought into the United States and that whether they are articles of commerce in the ordinary sense is wholly immaterial. The word "import" used in statutes has been given the broadest [fol. 39] construction. See United States vs. Sischo 262 U. S. 165.

The second contention involves a delicate question of construction which is not made less difficult by the state of the decisions on the point, and we do not find it necessary to hazard an opinion on it, because the case in our view is controlled by answering the third contention, whether the tax can be sustained as an inspection tax in view of the nature of the subject matter and the structure of the statutes, for if it can be then the tax is valid and the injunction should be denied.

It is settled law that the State has the widest powers over not only the taking, but the handling of fish and game within its borders. People vs. Lassen, 106 N. W. 143; People vs. O'Neal 68 N. W. 227; People vs. Booth Fisheries Co. 97 N. E. 837; Silz vs. Hesterberg, 211 U. S. 31.

In Silz vs. Hesterberg the Supreme Court held a law of the State of New York making it unlawful to possess game during the closed season valid as against a dealer in imported game who had in his possession during the closed season the dead body of an imported bird.

If the State has power to regulate the importation of fish and game in the interest of the protection of its own fish and game, it certainly has the power to levy an inspection

tax to carry out that purpose, this we think cannot be questioned. It remains only to consider whether the tax can be reasonably referred to that head.

It is established by the decisions that a presumption is indulged in favor of the legality and correctness of legislative action looking to the levy of an inspection tax, and that any tax levied by the Legislature which appears upon examination reasonably proportionate to the purposes and objects of inspection must be sustained. Red C Oil Co. vs. Board of Agriculture, 172 Fed. 695; Patapsco Guano Co. vs. North Carolina 171 U. S. 345; New Mexico vs. Denver [fol. 40] & Rio Grande Ry. 203 U. S. 38; Red C. Oil Co. vs. North Carolina 222 U. S. 381; Foote vs. Maryland 232 U. S. 495.

Considering the tax in question in the light of these authorities, having in mind its purposes and objects, we have no hesitation in finding that the tax is properly laid as an inspection tax that it is therefore strictly within the constitutional provision and that the injunction should be Denied.

Houston, Texas, December 22, 1926.

[File endorsement omitted.]

[fol. 41] In United States District Court

[Title omitted]

Petition for Appeal and Order Granting Same—Filed January 8, 1927

To the Honorable J. C. Hutcheson, Jr., judge of said court:

Now comes Gulf Fisheries Company, appellant, by Brantly Harris, its attorney, and feeling itself aggrieved by the final decree of this court entered on the 17th day of December, 1926, hereby prays that an appeal may be allowed to it from said decree to the Supreme Court of the United States, and in connection with this petition, petitioner presents its assignment of errors. Petitioner further prays that the amount of security may be fixed by the order allowing this appeal.

Brantly Harris, Attorneys for Appellant.

This appeal allowed and bond for appeal is fixed at 1,000 Dollars.

Rufus E. Foster, Duval West, J. C. Hutcheson, Jr., Judge-.

[File endorsement omitted.]

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR—Filed January 8, 1927

The appellant, Gulf Fisheries Company, says that in the record and proceedings aforesaid and in the entering of the decree denying injunction, as aforesaid, by the District Court of the United States for the Southern District of Texas, acting under Section 266 of the Judicial Code of the United States, with the assistance of Judge Rufus Foster of the Circuit Court of Appeals, for the Fifth Circuit, and Judge Duval West, District Judge for the Western District of Texas, there are manifest errors in this, to wit.

I

The Court erred in refusing injunction as prayed for in complaint for the reason that the agreed evidence showed that appellant was an importer of fish from without the United States (and the trial Court so found) and to require appellant to take out a wholesale fish dealers' license, paying to the State of Texas fee of $10.00 for same and a tax of $1.00 per each thousand pounds of fish imported by appellant, as required by Chapter 178 of the Laws of the 39th Legislature of the State of Texas, Article 13, also being Article 936 Penal Code of Texas, 1925, is in violation of the Constitution of the United States and said act is void, being a tax on imports in violation of Article I, Section 10, Paragraph 2, of the Constitution of the United States, which reads as follows:

[fol. 43] "No State shall without the consent of Congress lay any imposts or duties on imports or exports except what

may be absolutely necessary for the execution of its Inspection Laws."

II

The Court erred in refusing injunction and in holding that the wholesale fish dealers' tax involved in this case is an inspection tax and permitted although levied on imports, under Article I, Section 10, Paragraph 2, of the Constitution of the United States.

III

The Court erred in refusing injunction as prayed for in complaint because the agreed facts show that the tax is a tonnage tax on imported fish, and the evidence establishes that the fish at the time taxed had not lost their character as imports, not having been mixed or co-mingled with the other property in the State of Texas.

Therefore, the Gulf Fisheries Company, appellant, prays that the decree for the United States District Court for the Southern District of Texas, denying your appellant the injunction prayed for in its bill of complaint, may be reversed and annulled on account of the errors aforesaid and that a decree may be entered, declaring Chapter 178 of the Laws of the 39th Legislature, Article 13; Article 935 of the Revised Penal Code; as void and repugnant to Article I, Section 10, Paragraph 2, of the Constitution of the United States, and restraining appellee from interfering with appellant or its business by the attempt to enforce said law and restraining appellees, their agents, attorneys and employees from causing appellant, its officers, servants and employees to be arrested or from taking any other action or in any manner interfering with appellant or its business or attempting to collect any tax by reason of said void law.

Maco Stewart, Brantly Harris, Counsel for Appellant.

[fol. 44] [File endorsement omitted.]

[fols. 45-47] Bond on Appeal for $1,000, approved and filed January 8, 1927, omitted in printing.

[fol. 48] Citation, in usual form, showing service on D. B. MacInerney, filed January 12, 1927, omitted in printing.

[fol. 49] In Supreme Court of the United States

Stipulation and Addition to Record—Filed March 14, 1927

It is hereby stipulated and agreed by counsels of record in the above entitled and numbered cause, that the attached motion for temporary restraining order and interlocutory injunction, and the attached order submitting motion of respondent to dismiss bill of complaint, and the application of complainant for preliminary injunction, be included in the record in the Supreme Court of the United States and request is made that the attached documents be printed with that portion of the record heretofore designated to be printed.

Brantly Harris, Counsel of Record for Gulf Fisheries Company. Claude Pollard, Atty. Genl.; D. A. Simmons, 1st Asst. Atty. Genl., Counsel of Record for D. B. MacInerney, County Attorney, substituted for original respondent, John L. Darrouzet.

[fol. 50] In United States District Court

Gulf Fisheries Company

vs.

John L. Darrouzet

Motion for Temporary Restraining Order and Interlocutory Injunction—Filed June 21, 1926

To the honorable judge of said court:

Now comes plaintiff, Gulf Fisheries Company, and files this, its motion for the issuance of a restraining order for

the reasons and on the grounds set forth in its bill of complaint to prevent irreparable damage to plaintiff and plaintiff further makes this its application to this court for a hearing on this cause for an interlocutory injunction in accordance with Section 266 of the Judicial Code of the United States, as amended by act of Congress, approved March 4, 1913.

Maco Stewart, Brantly Harris, Attorneys for plaintiff.

[File endorsement omitted.]

[fol. 51] Clerk's certificate to foregoing paper omitted in printing.

[fol. 52] In United States District Court

[Title omitted]

Gulf Fisheries Company

v.

John L. Darrouzet, District & County Attorney, Galveston County, Texas

Order Submitting Motion to Dismiss Bill of Complaint, etc.—Filed November 2, 1926

This cause came on this day to be heard upon the motion filed on behalf of the respondent to dismiss the bill of complaint, as also upon the application of the complainant for a preliminary injunction herein—present: Brantley Harris, of counsel for the plaintiff; C. A. Wheeler, Asst. Attorney General, appearing on behalf of the respondent—and was argued by counsel for the parties in interest and submitted upon briefs to be filed, when the Court took time to consider.

[File endorsement omitted.]

[fol. 53] Clerk's certificate to foregoing paper omitted in printing.

[fol. 53½] [File endorsement omitted.]

[fol. 54] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation of Parts of Record to be Printed—Filed February 14, 1927

To the Honorable William R. Stansbury, Clerk of said Court:

The appellant Gulf Fisheries Company hereby designates the following points, upon which it will rely, being all of its assignments of error:

I

The Court erred in refusing injunction as prayed for in complaint for the reason that the agreed evidence showed that appellant was an importer of fish from without the United States and to require appellant to take out a wholesale fish dealers' license, paying to the State of Texas, fee of $10.00 for same and a tax of $1.00 per each thousand pounds of fish imported by appellant, as required by Chapter 178 of the Laws of the 39th Legislature of the State of Texas, Article 13, also being Article 93C Penal Code of Texas, 1925, is in violation of the Constitution of the United States and said act is void, being a tax on imports in violation of Article 1, Section 10, Paragraph 2, of the Constitution of the United States, which reads as follows:

"No State shall without the consent of Congress lay any imposts or duties on imports or exports except what may be absolutely necessary for the execution of its Inspection Laws."

II

The Court erred in refusing injunction and in holding that the Wholesale fish dealers' tax involved in this case is

an inspection tax and permitted although levied on imports, under Article I, Section 10, Paragraph 2, of the Constitution of the United States.

[fols. 55 & 56] III

The Court erred in refusing injunction as prayed for in complaint because the agreed facts show that the tax is a tonnage tax on imported fish, and the evidence establishes that the fish at the time taxed had not lost their character as imports, not having been mixed or co-mingled with the property of the State of Texas.

Please print the following portions of the Record:

1. The original complaint or bill in equity.
2. Motion to and order of Court substituting D. B. MacInerney for the original defendant John L. Darrouzet.
3. First amended original answer.
4. Statement of the evidence including the copies of the law involved in this case.
5. Order of Court denying injunction; this to include both final decree prepared by the Court and also final decree prepared by the Attorney General's Department and signed by the Court.
6. Application for appeal.
7. Order allowing appeal.
8. Assignment of Errors.
9. Citation with return on same.
10. Bond on appeal.
11. Opinion of the Court.

I am omitting the motion for respondent to dismiss bill of complaint as this was not urged in the Lower Court, but was abandoned as far as any law was concerned.

Brantly Harris, Attorney for Gulf Fisheries Co.

[fol. 57] [File endorsement omitted.]

Endorsed on cover: Filed No. 32,443. S. Texas, D. C. U. S. Term No. 876. Gulf Fisheries Company, appellant, vs. John L. Darrouzet, District and County Attorney of Galveston County, Texas, D. B. MacInerney substituted by agreement. Filed February 3rd, 1927. File No. 32,443.

(18)

Office Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 178

GULF FISHERIES CO.,

APPELLANT,

vs.

JOHN L. DARROUZET, DISTRICT AND COUNTY ATTORNEY OF GALVESTON COUNTY, TEXAS; D. B. MacINERNEY, SUBSTITUTED BY AGREEMENT,

APPELLEES.

Appeal from the District Court of the United States for the Southern District of Texas.

Brief for Gulf Fisheries Company, Appellant.

BRANTLY HARRIS,
Solicitor for the Gulf Fisheries Company.

STEWART, DAMIANI & HARRIS,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 178

GULF FISHERIES CO.,
APPELLANT,

vs.

JOHN L. DARROUZET, DISTRICT AND COUNTY ATTORNEY OF GALVESTON COUNTY, TEXAS; D. B. MacINERNEY, SUBSTITUTED BY AGREEMENT,
APPELLEES.

Appeal from the District Court of the United States for the Southern District of Texas.

Brief for Gulf Fisheries Company, Appellant.

STATEMENT OF THE CASE.

The Gulf Fisheries Company filed a bill for injunction in the District Court of the United States for the Southern District of Texas, on June 18, 1926, to enjoin the County Attorney of Galveston County from enforcing the wholesale fish dealers' license law of Texas, on the ground that said license tax was a tax on imports and therefore void, under Article 1, Section 10, Paragraph 2 of the United States, which reads as follows:

"No state shall without the consent of Congress lay any imposts or duties on imports or exports except what may be absolutely necessary for the execution of its inspection laws."

The facts in this case are not in dispute, there being an agreed statement of facts filed in the case, printed Transcript, page 9, and are substantially as follows:

The Gulf Fisheries Company is a New York corporation, with office at Galveston, Texas, with permit to do business in the State of Texas, and is engaged in the business of catching fish in its own vessels, the majority of the fish being caught in foreign waters. In fact, the answer filed, it is admitted all of the fish were caught in foreign waters. (Tr. 7).

The said company brings the fish into Galveston on the very vessels in which the fish are caught, said fish being mostly red snappers. After the fish are caught they are brought to the Port of Galveston where the Gulf Fisheries Company has wharf privileges on wharves owned by the Galveston Wharf Company, having only enough space to handle the shipping of the fish.

Upon landing at Galveston the fish are washed and all the fish are weighed, approximately seventy-five per cent are headed and gutted, seven to ten per cent are gutted and gilled and heads left on. The remainder are sold without beheading or removing the gills or entrails. Only fifteen to twenty per cent of the fish are sold in Galveston; these to wholesale dealers. The fish are not cooked or treated in any manner, but are shipped to the purchasers throughout Texas and other states in the same condition as when caught except that the fish are washed and the heads and entrails are removed as before stated, said fish being placed loose in barrels, and iced for shipment.

About twenty-five per cent of the fish are shipped to states other than Texas by railway express.

As fast as the fish are received and washed they are loaded in express cars, and practically all of the fish are shipped the day said fish are unloaded from boat on which they are brought into Galveston.

The Gulf Fisheries Company sells no fish at retail at its place of business or elsewhere, but sells all the fish in the manner and way stated in large quantities to such people as wholesale fish dealers in quantities of fifty pounds and up, about four hundred pounds being the average order.

The Gulf Fisheries Company imports into the United States about nine hundred thousand pounds of fish yearly, the value of these fish being about Seventy-Two Thousand Dollars, Tr. p. 14.

The State of Texas is insisting that the Gulf Fisheries Company must pay wholesale dealers' license, and has filed criminal proceedings against Frank Thompson, one of plaintiff's employees, for failure to pay the wholesale fish dealers' license tax, and will continue to prosecute any and all of plaintiff's employees responsible for failure to pay said tax of One Dollar for each one thousand pounds of fish sold and handled by plaintiff. Tr. P. 13.

The wholesale fish dealers' tax law reads as follows: Transcript of Record, page 14:

"Any individual firm or corporation engaged in, or who may engage in the business of a wholesale dealer in fish and oysters shall secure from the Game, Fish and Oyster Commissioner, or one of his deputies a license granting such individual, firm or corporation, permission to engage in said occupation for one year. For the purpose of obtaining this license the applicant desiring same must make written application to the Game, Fish and Oyster Commissioner, or one of his deputies, in which he (the applicant) shall set forth under oath, if required, that he is a citizen of the United States by birth, or not being so, shall state that he has been granted full naturalization papers, and by what court and at what time they were granted. Where a corporation applying for permit to conduct a wholesale business in fish, oysters, or other marine products as mentioned, contains foreigners, it shall con-

form to the foregoing provision as applied to individual applicants. He shall also agree that because of the privilege which he applied for from the State of Texas, that all products handled by him shall, at all times, be subject to the inspection of the Game, Fish and Oyster Commissioner, or any of his deputies; and in said application he shall authorize said Commissioner or any of his deputies to enter his place of business, or any place where he may have such products stored and inspect same. He shall agree to keep correct record of all fish, oysters, shrimp and other taxed marine life handled by him under this law in a book to be furnished by the Game, Fish and Oyster Commissioner; and further, that failure on his part to keep a correct record shall be grounds for the forfeiture of his license granted him under the application aforesaid. This application, having been duly executed and delivered to the Game, Fish and Oyster Commissioner, or his deputy, to issue to the applicant (fol. 30) a license to engage in the business set forth in the application. Said licenes must be signed by the Game, Fish and Oyster Commissioner, or one of his deputies, stamped with the seal of his office, and state the name of his licensee, place of business and the kind of license applied for and shall be good for twelve months following the date of issuance. For such license the applicant shall pay One ($1.00) Dollar for each one thousand pounds of fish, shrimp and crabs handled by him, and a tax of one cent per barrel on oysters handled by him, which tax shall be paid monthly, the tax to be paid on the first of each month, which may be due upon said products handled during the preceding month as shown by the record books, hereinbefore mentioned. And any person, firm or corporation, or association of persons, or any officer, agent or employe of any company, corporation or association of persons who shall engage in the business of a wholesale dealer in fish and oysters or either without procuring a license to follow said business, or without paying the tax and fee required by this article, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than Fifty ($50.00) Dollars, nor more than Two Hundred ($200) Dollars; and each day such business may be engaged in (in) violation of this article shall constitute a separate of-

fense, and upon conviction of pursuing said occupation without payment of the tax and fee required by law, or for any other violation of the game, fish and oyster law, the license of such dealer shall be forfeited. A wholesale dealer in the meaning and definition of this chapter is any person, corporation or firm or partnership engaged in the business of buying and selling or handling for shipment fish, oysters, shrimp, turtle, terrapin, crabs, clams, lobsters or other commercial marine life in quantities of ten pounds or more to any customer during the same day, or whose daily sales or whose sales for any one day, amount to more than the aggregate of one hundred pounds of above mentioned marine products."

The County Attorney filed his answer, Tr. page 6, in which he says:

"All fish obtained by plaintiff for the purpose of sale are from foreign waters and said fish are composed largely of red snappers."

He admits in this answer that twenty-five per cent of the fish are shipped to states other than Texas by railway express or by freight. Defendant's defense, as outlined in his answer, is:

(1) That the fish in question were not imports, raising the issue as follows (Tr., page 9):

The defendant denies that the fish caught by plaintiff and brought into the City of Galveston, Galveston County, Texas, and unloaded at plaintiff's place of business, constitute an import under the laws and Constitution of the United States.

(2) The said fish have lost their character as imports, raising the issue as follows:

And further avers that if said fish brought into Galveston, brought in Galveston in plaintiff's vessels, are imports, that they did and do lose their status and identity as

such by reason of the fact that the plaintiff does not sell such fish in the form and manner and package in which said fish are brought into Galveston, Texas, but that the catch of fish brought into Galveston, Texas, by plaintiff are changed in form, manner and package and are sold in different packages without regard to size, condition and manner in which they were received in Galveston, Texas, and that said fish, in being unloaded at plaintiff's place of business in the City and County of Galveston, Texas, are there so acted upon as to become mixed and mingled with the general mass of property within the State of Texas.

Defendant does not at any place set up that the tax in question is an inspection tax, and nowhere in his two trial briefs did he allege or mention the point that the tax lexied is an inspection tax.

Hearing on temporary injunction was asked by motion filed June 21st, 1926, Tr. page 25, and Judge Hutcheson, the District Judge for the Southern District of Texas, issued his order calling a Circuit Judge and another District Judge to his assistance to hear this temporary injunction application, plaintiff having filed a motion for temporary restraining order and interlocutory injunction (original (not the printed) Transcript of Record, page 16) The case was submitted in New Orleans before the three - judge Court on temporary injunction (Transcript of Record page 26). Decree was entered December 17, 1927. Tr. page 16. A second decree was later entered, dated back of entry of the original decree (Transcript of Record, page 17), which would indicate that judgment on final injunction had also been entered in this case, dissolving temporary injunction and refusing final injunction.

If this statement in the second decree is accepted as correct, then a temporary injunction was granted, and

this is on final injunction, therefore appealable to the Supreme Court under decision of:

Clark et al, vs. Poor et al, 71 L. E., 776. Decided May 31, 1927.

Moore vs. Fidelity & Deposit Co., 71 L. Ed. 110, case No. 185 retake terms 1926, 272, U. S. 317.

Smith vs. Wilson et al, 71 L. Ed. 413, 47 S. C. 385.

or if it is appealed from a temporary injunction, it is appealable direct to the Supreme Court.

The Trial Court held that there were three defenses before it. Tr. page 20:

(1) The fish are not imports, because fish being ferae naturae, are not the subject of private property, and therefore are not within the inhibition of the invoked provision of the Constitution.

The Court held that the fish were imports.

(2) That if the fish are in their nature imports, in this particular case they have become so mingled with the common mass of the property in the state as to lose their character as such, and therefore, their exemption.

The Trial Court does not decide this point, holding as follows (Transcript of Record, page 21):

The Second contention involves a delicate question of construction which is not made less difficult by the state of the decisions on the point, and we do not find it necessary to hazard an opinion on it, because the case in view is controlled by answering the third contention.

(3) Conceding them to be imports, the tax levied and is necessarry for inspection purposes to protect the fish and game, and therefore is levied under direct authority of the Constitution.

This point was not briefed by either party because it was conceded in the pleadings that the tax was not an inspection tax, and therefore, the trial court did not have a brief

before it from either party on this question, and the pleadings did not raise this point by either party.

The injunction was denied on the view that it was an inspection tax. This denial was appealed of, petition of appeal being filed on January 8th, the appeal being based on the assignments of error, which follow.

PRELIMINARY JURISDICTIONAL QUESTIONS.

This suit is a suit arising under the laws of the Constitution of the United States, and the citizenship of the parties is diverse. The amount involved is the right to do business without having unlawful burdens of taxes imposed upon the Gulf Fisheries Company. The following authorities sustains the jurisdiction:

Rose, Federal Procedure, Page 187, Second Edition.

Missouri Pacific Railway Company vs. Ward, 2 Wallace, 492, 17 L. Ed., holding that in the case of a bill by the owners of the tug against illegal exactions for using a canal, showing owner subject to charges thereby imposed amounting to $1,600.00 a year, gives Federal Court jurisdiction.

See also American Smelting Company vs. Godfrey, 158 Federal, 228; Board of Trustees vs. Berryman, 156 Federal, 116, holding a suit by an educational institution to restrain collection of illegal tax, jurisdiction is not governed by the amount of tax but by the value of the right claimed.

Also Louisville Railroad Company vs. Bitterman, 114 Federal, 44, 75 C. P. A., 192, holding a suit by carrier to restrain scalping of excursion tickets to the value of the business sought to be protected determines the amount in controversy.

See also Louisville Railroad Company vs. Smith, 128 Federal, 5, 63 C. P. A., 1, the Court held that in a suit in

the Federal Court against several land owners to enjoin threatened interference with the use of its right of way through their land, the value of the right sought to be protected, not the value of the land constituting the right of way, is the value in controversy.

In this instance, the amount in controversy is the right of the complainant Gulf Fisheries Company to do business which amounts to about a million pounds of fish per year without being subject to an importation tax, such tax not being levied in other states in which the business similar to the Gulf Fisheries Company are situated, and the Gulf Fisheries Company must compete in its interstate business with those companies that are not required to pay a tax, and, therefore, the damage to plaintiff's business is irreparable.

The appeal to the Supreme Court direct from the District Court composed of three judges is, by virtue of Section 238, Federal Judicial Code, Section 345, U. S. Code, and by reason of Section 380, United States Code, Section 266, of the Federal Judicial Code, and the Judiciary, which provides:

"No interlocutory injunction suspending or restraining the enforcement or operation or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state, shall be issued or granted by any justice of the Supreme Court or by any District Court of the United States, or by any judge thereof, or by any Circuit judge acting as district judge, upon the ground of the unconstitutionality of such and determined by three judges, etc."

this statute providing for that a direct appeal to the Supreme Court may be taken from a final decree granting

or denying a permanent injunction in such suit, and also said statute providing that an appeal may be taken direct to the Sureme Court of the United States from order granting or denying, after notice and hearing, interlocutory injunction in such case.

Clark et al, vs. Poor et al, 71 L. E., 776. Decided May 31, 1927.

Smith vs. Wilson et al, 71 L. Ed. 413, 47 S. C. 385.

Moore vs. Fidelity & Deposit Co. 71 L. Ed. 110, 272 U. S. 317 application for preliminary injunction was made, printed transcript page 25. Three judges were called.

ASSIGNMENTS OF ERROR.

(1) The Court erred in refusing injunction as prayed for in complaint for the reason that the agreed evidence showed that appellant was an importer of fish from without the United States (and the trial Court so found) and to require appellant to take out a wholesale fish dealers' license, paying to the State of Texas a fee of $10.00 for same and a tax of$1.00 per each thousand pounds of fish imported by appellant, as required by Chapter 178 of the laws of the 39th Legislature of the State of Texas, Article 16, also being Article 936 Penal Code of Texas, 1925, is in violation of the Constitution of the United States and said act is void, being a tax on imports in violation of Article I, Section 10, Paragraph 2, of the Constitution of the United States, which reads as follows:

(fol. 43) "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for the execution of its Inspection Laws."

(2) The Court erred in refusing injunction and in holding that the wholesale fish dealers' tax involved in this case is an inspection tax and permitted, although

levied on imports, under Article 1, Section 10, Paragraph 2, of the Constitution of the United States.

(3) The Court erred in refusing injunction as prayed for in complaint because the agreed facts show that the tax is a tonnage tax on imported fish and the evidence establishes that the fish at the time taxed had not lost their character as imports, not having been mixed or commingled with the other property in the State of Texas.

POINT 1.

The fish handled by appellant are imports.

The first question arising case is, as to whether or not the fish in controversy are imports. The Trial Court in this case so found.

The Gulf Fisheries Company vs. Darrouzet, 17 Federal, 2d Series, 374, Transcript 21: "Considering these contentions in their order, we think as to the first contention (whether the fish are imports) it is sufficient to say that the Constitution prohibits taxes on imports; that these fish certainly are imports, that is, objects or things brought into the United States, and the whether they are articles of commerce in the ordinary sense is wholly immaterial. The word 'imports' used in the Statutes has been given the broadest construction. The United States vs. Sisheo, 262 U. S., 165; 43 S. Ct., 511; 67 L. Ed., 925."

Brown vs. Maryland, 12 Wheat, 419, 6 L. Ed., 678, imports are defined as follows:

"An impost or duty on imports is a customs or tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his right of ownership. * * * What then are imports? The lexions inform us that they are things imported. If we appeal to the usage for the meaning of the word, we shall receive the same answer. They are articles

themselves which are brought into the country. Webster defines imports as merchandise imported or brought into a country from without its boundaries." Corpus Juris 31, page 257, defines imports as an article brought into the country, citing Woodruff vs. Parham, 8 Wall 123, 131, 19 L. Ed., 382.

Beauvier's Law Dictionary, Unabridged, defines imports as goods or other property imported or brought into the country from foreign territory, citing Story, Constitution, Section 949.

So by the very statement of facts which has been agreed to, the majority of the fish are caught in foreign waters and all of the fish are caught outside the territorial waters of the United States, so clearly under the decisions the fish are imports.

POINT 2.

The fish have not become so mingled with the common mass of property in the state so as to lose their character as imports, and, therefore, their exemption from state taxation.

In the case of Brown vs. Maryland, 12 Wheat, 419; 6 L. Ed., 678, it was attempted in that case to have the Court hold that after the imports had reached the country they were then subject to taxation, and the court had occasion in that case to consider how long imports retained their immunity from state taxation. The Court in that case said (12 Wheat, 441-442):

"The Constitutional prohibition on the states to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power,

and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. **It is sufficient for the present to say generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution.**"

The Court continues on page 442:

"This indictment is against the importer for selling a package of dry goods in the form in which it was imported without a license. This state of things is changed if he sells them, or otherwise mixes them with the general property of the state, by breaking up his package and traveling with them as an itinerent peddler. In the first case, the tax intercepts the import, as an import, in its way to become incorporated with the general mass of property and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the state. It denies the importer the right of using the privilege which he has purchased from the United States until he shall have also purchased it from the state. It denies the importer the right of using the privilege which he has purchased from the United States, until he shall have also purchased it from the state. In the last case, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased and has himself mixed them up with the common mass and the law may treat them as it finds them.

The same observations apply to plate or other furniture used by the importer."

The Brown case is cited in the license cases, 5 Howard, 504 12 L. Ed, 256, Justice Taney in that case says in part:

"Further and more mature reflection has convinced me that the rule laid down by the supreme court is a justly made one, and perhaps the best that could have been adopted for preserving the right of the United States on the one hand and of the state on the other, and preventing collisions between them. The question, I have always said, was a difficult one for the judicial mind. In the nature of things, the line of division is in some degree vague and indefinite, and I do not see how it could be drawn more accurately and correctly or more in harmony with the obvious intention and object of the provisions of the Constitution. Indeed, goods imported while they remain in the hands of the importer, in the form and shape in which they were brought into this country, can in no just sense be regarded as part of the mass of property in the state usually taxed for the support of the state government. The immense amount of foreign products used and consumed in this country are imported, landed and offered for sale in a few commercial cities and a very small portion of them are intended or expected to be used in the state in which they are imported. A great (perhaps the greatest) part imported in some of the cities is not owned or bought in by citizens of the state, but by citizens of other states or foreigners, and while they are in the hands of the importer for sale in the form and shape in which they are introduced, and which they are intended to be sold, they may be regarded as merely in transit, and on their way to distant cities, villages and countries for which they are destined, and where they are expected to be used and consumed, and for the supply of which they were imported, and a tax upon them while in this condition for state purposes, whether by direct assessment or indirectly by requiring a license to sell, would be hardly more justifiable in principle that in terms of duty upon merchandise in passing through a state. A tax in any shape upon im-

ports is a tax upon the consumer, by enhancing the price of the commodity, and if a state is permitted to levy it in any form it will put it in the power of a maritime importing state to raise the revenue for the support of its government from citizens of other states as certainly and as effectually as if the tax was laid openly and with disguise as a duty on imports. Such a power in a state would defeat one of the principal objects of the forming and adopting of the Constitution. It can not be done directly in the shape of a duty on imports, for that is expressly prohibited, and as it can not be done directly it can hardly be a just and sound construction of the Constitution that would enable a state to accomplish precisely the same thing under another name and in a different form."

Chief Justice Taney represented the State of Maryland before the Supreme Court in the case of Brown vs. Maryland. His interpretation of this case is given in the license cases, 12 L. Ed., 256, 288; 5 Howard, 504, 574-575:

"The question came directly before the Court the first time the case of Brown vs. Maryland, 12 Weeks, 419, and the Court there held that an article authorized by law of Congress to be imported continued to be a part of the foreign commerce of the country while it remained in the hands of the importer for sale in the original bale, package or vessel in which it was imported, and the authority given to import necessarily carrying with it the right to sell the imported article in the form and shape in which it was imported, and that no state, either by direct assessment or by requiring a license from the importer before he was permitted to sell, could impose any burden upon him or the property imported beyond what the law of Congress had itself imposed."

"When the original package was broken up for use or for retail by the importer, and also when the commodity had passed from his hands into the hands of the purchaser, it ceased to be an import or a part of foreign commerce

and became subject to the laws of the state and might be taxed for the state purposes, and the sale regulated by the state like any other property."

"This I understand to be substantially the decision in the case of Brown vs. the State of Maryland, drawing the line between foreign commerce, which is subject to regulation of commerce, and internal or domestic commerce, which belongs to the state, and over which Congress can exercise no control."

"I argued the case in behalf of the state and endeavored to maintain that the law of Maryland, which required that an importer as well as other dealers take out a license before he could sell, and for which he was to pay a sum of money to state."

In the case of Low vs. Austin, 13 Wall, 29, 20 L. Ed. 517, 80 U. S., 456, the plaintiffs had been for several years importing shipping and commission merchants in the city of San Francisco, state of California; in 1868 they received on consignment from parties in France champagne, wines, to the value of $10,000.00, upon which they paid duties and charges of the custom house. They then stored wine in their warehouses in San Francisco in which the wines were imported, where they remained for sale. While in this condition they were assessed as property of the plaintiff for the State, City and County taxes, and under the general revenue laws of California. Defendant was the tax collector of the City and County of San Francisco, levied on the property and was about to sell same when the plaintiff paid the charges incurred under protest and brought this action to recover same back.

The case held that the state could not levy taxes on imports in this manner, quoting the case of Brown vs. Maryland, 12 Wheat, 419, as follows:

"The decision of this Court in the case of Brown vs. Maryland, 12 Wheat, 419, furnishes the answer to this question. The distinction between that case and the present case does not affect the principle affirmed, which equally governs both. In that case the question rose whether the act of the Legislature of Maryland, requiring importers of foreign goods by bale or package to pay the license before selling them in the form and condition in which they were imported, was valid and constitutional. The Court held the act in conflict with the provision of the Constitution, which declares that no State shall, without the consent of Congress, lay any impost or duty on imports or exports except what may be absolutely necessary for executing its inspection laws. * * * In that case it was also held that the authority given to imports necessarily carries with it the right to sell the goods in the form and condition, that is in the bale or package in which they were imported, and that the exaction of a license tax for permission to sell in such was not only invalid as being in conflict with the Constitutional prohibition upon the state, but also as an interference with the power of Congress to regulate commerce with a foreign nation."

The doctrine of Brown vs. Maryland has been recognized by the Supreme Court as late as the case of Sonneborn Bros. vs. Keeling, 262 U. S., 506; 67 L. Ed., 1095, in which case Mr. Justice Taft said:

"The reasoning is based on the supposed analogy of the immunity from taxation of imports from foreign countries, which lasts until the article imported has been sold or has been taken from its original package of importation, and added to the mass of the merchandise of the state. This immunity of imports was established by this case in Brown vs. Maryland, 12 Wheat, 419; 6 L. Ed., 678, and was declared in obedience to the prohibition of the Constitution contained in Section 10, Article 1, Paragraph 2, providing that

"No state shall without the consent of Congress lay any impost or duties on imports or exports except what

may be absolutely necessary for the execution of its inspection laws."

The whole point is that the sale was part of the importation. It is the article itself to which the immunity attaches, and whether it is in transit or is at rest, so long as it is in the form and package in which imported and in the custody and ownership of the importer, the state may not tax it.

This prohibition against the state taxing imports has been enforced as against a license or occupation tax on the importer in Brown vs. Maryland, 12 Wheat, 419, 6 L. Ed., 678, as against a personal property tax on a stock of wines of a wine dealer to the extent to which the stock included imported wines in the original package; Low vs. Austin, 13 Wall, 29, 20 L. Ed., 517; and as against an occupation tax on auctioneer measured by his commission on the sale of such imports; Cook vs. Pennsylvania, 97 U. S., 566, 24 L. Ed., 1015.

The above authorities, we believe, establishes the fact that the State can not levy any form tax directly or indirectly that is a tax on imports so long as they are in the hands of the original importer, and so long as they have not been commingled and mixed with the general property of the State, and that the case of Brown vs. Maryland is the law today so recognized, holding that to require an importer to take out a license constitutes a tax on the import.

Have the fish, which are imports, become so mingled with the common mass of property in the State as to lose their character as such, and therefore their exemption from taxation by the state?

The evidence shows that the fish are caught in foreign waters, and they are all caught in waters outside of the

United States and Texas (Transcript, page 10, et seq.) and are brought into the United States and Galveston.

"That after catching said fish as aforesaid, plaintiff brings said fish on its vessels to the port of Galveston, where it is accorded wharf privileges by the Galveston Wharf Company, such as are necessary to the conduct of business in unloading fish from the boats and loading same on express cars, and such space as is necessary in handling the office work incidental thereto. In the handling of said fish, plaintiff has several large bins or ice boxes for the storage and handling and receiving of said fish.

"That said fish are unloaded by the plaintiff from the vessels (fol. 25) of plaintiff in Galveston, Texas, and are at said place weighed and washed. All the fish are at said place weighed and washed and approximately seventy-five per cent are beheaded and gutted, and from seven to ten per cent are gutted and gilled with heads left on and the remainder are sold without beheading or removing gills or entrails; said fish are received at said place and are put with ice in barrels for shipment in filling orders, except fifteen or twenty per cent, which are sold within the City of Galveston to wholesale dealers. Said fish are not cooked or treated in any manner, but are shipped to purchasers in the same condition as when caught, excepting that said fish are washed, and the heads and entrails are removed as before stated, and then such fish with fresh ice are placed loose in barrels and so shipped. There are many wholesale dealers in fish in Texas, whose business is the buying of fish from the Gulf Fisheries Company and similar concerns and reselling same at retail." (Transcript of Record p. 12.)

After said fish are brought into Galveston as aforesaid they are immediately re-iced to keep said fish from spoiling and handled as above set forth.

About twenty-five per cent of the fish brought in are shipped to states other than Texas by railway express and by freight.

That plaintiffs have several large ice boxes on the wharf, where fish are unloaded; that none of said fish are stored in cold storage plants in the city, but are shipped out of Galveston as fast as said fish can be re-iced, washed and handled, as above stated, and loaded in express cars, and that practically all of said fish are shipped the day said fish are unloaded from the boats on which they are brought into Galveston. On a few occasions fish have been held in said ice boxes on plaintiff's premises for more than forty-eight hours, but this is an exception to the rule.

Plaintiff sells no fish at retail at its place of business or elsewhere, but sells all fish in the manner and place above stated in large quantities to such people as wholesale dealers in quantities of fifty pounds and up, about 400 pounds being the average order.

In the case of City of Galveston vs. Mexican Petroleum Corporation, 1926, A. M. C., 1394, 15 Fed. 2d, 208, the City of Galveston was seeking to levy taxes on oil brought into Galveston in tankers and pumped into the tanks, one of the contentions being that the oil was not in the original package after being pumped into the tank, and therefore subject to tax.

Judge Hutcheson, in that opinion, said:

"It is a matter of Hornbrook knowledge that the original package statement of Justice Marshall was an illustration rather than a formula, and that its application is evidentiary and not substantive, and I can not give my assent to the view expressed in the opinion of the Supreme Court of Maine in the Mexican Petroleum Company vs. Portland, that the tanks which brought the oil from Mex-

ico is the original package in the sense of the Constitutional construction, whether it is physically so or not."

Mr. Justice Marshall's statement will show that this is the correct conclusion. The opinion in the case of Brown vs. Maryland reads, page 12, Wheat 442:

"It is sufficient for the present to say generally that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property of the country it has furthermore lost its distinctive character as an import, and has become subject to the taxing power of the estate."

We think it is a true test. The opinion then goes on to explain further this general rule, and reads:

"But while remaining the property of the importer in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

The question then is, have the importers "so acted upon the things imported that it has become incorporated and mixed up with the mass of property in the country." The only time it is necessary to call in the original package theory is when there has been a placing of goods in storage, but in the case at bar the fish are at all times in actual transportation. They must pass from ship to express car somewhere, and they do this over the terminals of the Galveston Wharf Company, and to say because their heads are cut off that this constitutes such a change in form to cause the fish to become a part of the general property of the state and therefore subject to taxation is to look at the form rather than the substance.

The term "original package" is given the following interpretation in Cook vs. Marshall, 104 American State Reports 285; "the term imports, or foreign commerce or interstate commerce always implies the idea of goods, ware or merchandise manufactured, produced or prepared in one jurisdiction and carried into another for the purpose of sale. There can be no such commerce without transportation or carriage. For convenience and safety in such transportation most articles of commerce being shipped to an importer or buyer are confined into packages, in cases, boxes or other wrapping and directed to the proper consignee. In this form they do not ordinarily enter into the retail or general trade of the community and the fact that the package is unbroken is an indication that the goods have not yet lost their distinctive character as imports, or become mingled with the mass of property subject to the jurisdiction of local authorities. The recognition of this feature by Mr. Chief Justice Marshall in Brown vs. Maryland, 12 Wheat 419, 6 L. Ed. 678, is the foundation on which all subsequent original package decisions in the various courts of the land are sought to be justified. In this, as in other notable instances, the principle then announced has been so distorted and wrested from its original simple meaning that if the great jurist were permitted to return to the scene of his historic labors, he would doubtless hesitate long before he acknowledged the legitimacy of the descent of the modern doctrine. It should not be overlooked that the pronouncement of Mr. Chief Justice Marshall upon which such reliance is placed was made in reference to foreign commerce only, and that the words so often quoted were employed in discussing the Constitutional prohibition of duties and imposts by state authorities and did not involve any consideration of interstate commerce. Citing Woodruff vs. Pharmon, 8 Wall 123, 19 L. Ed. 382. This distinction is noted and empha-

ized in the majority of the opinions in the case of Austin s. Tennessee, 179 U. S. 343, 21 S. Ct. Reports, 132, 45 L. Ed. 224, hereafter more particularly referred to."

"The term original package as employed in law admits f no precise definition applicable to all cases. Generally is said to be a parcel, bundle, bale, box or case made p of or packed with some commodity with a view to its afety and convenient handling in transporting. Citing Keefe vs. State, 91 Alabama 287, 353, 10 L. R. A. 430; tate vs. Board of Assessors, 46 Louisiana, 146, 49 Ameri- an State Reports 318, 15 Southern 10, Austin vs. State, 01 Tennessee 563, 70 American State Reports 703, 48 S. V. 305, L. R. A. 478, Commonwealth vs. Schollenberg, 156 Penn State 201, 36 American State Reports 32, 27 Atlantic 0, 32 L. R. A. 165.

It does not necessarily mean that goods shall be en- losed in a tightly sealed receptacle, citing other cases. It elates wholly to goods prepared for transportation, and as no necessary reference whatever to the package origi- ally prepared or put up by the manufacturer. Indeed he idea of an original package may well be made to cover ertain forms of property which do not ordinarily admit f being packed or encased in any other manner than in the ar or vessel in which they are transported. Such for in- tance as steel beams, threshing machines, and other bulky rticles. Therefore, in such cases, the unit of package for he purpose of interstate commerce is the carload or cargo r the entire consignment or the individual articles of which he consignment is composed is unnecessary for us to con- ider. Fortunately, in regard to the very class of goods ow in controversy, we are not left without a controlling etition."

27 Am. St. Rep. 542. Note by Mr. Freeman to People vs. Vemple:

"Original packages—Evidently the original package

referred to in these decisions was and is the package of the importer as it existed at the time of its transportation from one state into the other. The whole subject has relation to commerce and to interstate commerce, and to nothing else. Hence the words must mean the package as transported by the importer himself, or by his agent, either a common carrier or a private carrier, for the purposes of commerce; and therefore it would seem that it is for the importer to determine how large or how small the package should be, and the manner in which the package should be made up, and the materials used in making it up. * * * * In some cases of interstate commerce it would scarcely seem necessary that any package should be used. For instance in the transportation of live stock, the individual articles transported might be horses, cows, sheep, or hogs, and these articles might be very large or very small, even little pigs, and none of them placed in packages. State vs. Winters, Kans. 728.

* * * * We think that the use of the term 'original package' was merely intended to furnish one of the tests by which it could easily be ascertained whether the articles in question were the same articles imported, and to assert that because they were still in such package, they could not have been co-mingled with other articles, and were therefore undoubtedly still entitled to protection. But there is no reason why this test should be exclusive."

Under the above authorities, we feel that Judge Hutcheson was correct when he said, in the City of Galveston vs. Mexican Petroleum Corp., 15 Fed. 2nd, 208, "It is a matter of hornbook knowledge that the original package statement of Judge Marshall was an illustration rather than a formula and that its application is evidentiary and not substantive."

We feel that under these authorities if an original package is required, the fish are in their original package and the cutting off of the heads of the fish is not a division for the purpose of sale and distribution. Each fish is the original package and there is no division of the fish for

the purpose of sale, any more than cutting off the tail of a dog would change the original package in which the dog was contained. There can certainly be no mixing of the fish with the other fish within the jurisdiction of the State of Texas because they are at all times moving in commerce. Simply in moving the fish from boat to express car, they pass to a table where they are weighed into express cars across the terminal; it certainly can not be contended that the boat in which the fish were shipped were the original package, in view of United States vs. 65 casks of liquor extracts, 170 Federal 449, affirmed 175 Federal 1022, holding that where casks containing liquor which was shipped in carload lots, the casks and not the car constituted the original package. See also the City of Galveston vs. Mexican Petroleum Corporation, 15 Fed, 2nd Series, 208. Certainly fifteen per cent of the fish are in their original packages, even should the Court take the view that the balance of package has been changed, although not subdivided for the purpose of sale. This fifteen per-cent (Transcript of Record, page 7) beyond shadow of a doubt, are in their original package, and the license tax covers them as well as the others, for where several bundles of merchandise, each of which constitute an original package, are imported, the breaking of one does not constitute a breaking of the others. See State, ex rel. vs. Board of Assessors, 46 Louisiana Annotated, 145, 49 Amer. State Reports 318, 15 Southern 10.

POINT 3.

The wholesale fish dealers' tax of Texas is a license tax for the privilege of engaging in the business of wholesale fish dealers, and therefore, void as a tax on imports.

The Court below in the case at Bar, held that the Texas wholesale fish dealers' license law was an inspection law,

and the tax levied thereunder was an inspection tax. It will be best to examine the history of this law.

We have added the entire law as Appendix 'A' to the brief, page .....

This act was passed by the Second Special Session of the 36th Legislature, 1919. Article 16 of this act was at that time copied into the Penal Code of Texas. This deals with the wholesale fish dealers' license, same being Article 917, of the Texas Penal Code, 1920. At the bottom of this Article of the Penal Code is found the following: "This Article is part of Article 16, of Acts of 1919, Second Called Session, Chapter 73; for the remainder of said Article see ante, Civ. St., art. 3987."

In placing this into the Penal Code, it was condensed by the compilers and the words "For the protection of the fish and oyster industry" were left off, that being surplus as far as the penal part was concerned and the Articles read, leaving off 'for the protection of the fish and oyster industry' the same as Article 16 of said Act, reading as follows:

"And any person, firm or corporation or association of persons, agents or employes of any company, corporation or association of persons, who shall engage in the business of wholesale dealer in fish and oysters, or either, without procuring a license to follow said business, or without paying the tax and fee required by this Article, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than $50.00 and no more than $200.00, and each day such business may be engaged in violation of this article, shall constitute a separate offense, and upon conviction for pursuing said occupation without payment of tax and fee required by law, or for any other violation of the game, fish and oyster law, the license of said dealer shall be forfeited."

The Revised Statutes of Texas being a compilation of all the Statutes up to 1925, was passed, which was not in-

tended to make any new law but simply to compile and re-enact all laws in existence, contains the present wholesale dealers' license law.

The Constitution of Texas, Article 3, Section 35, provides:

"No bill except general appropriation bills, which may embrace the various subjects and account for and on account of which monies are appropriated, shall contain more than one subject, which shall be expressed in its title, but if any subject shall be embraced in the Act which shall not be expressed in its title, such Act shall be void only as to so much thereof as may not be expressed."

So in Texas, to determine the purpose of the act you look at the caption. The caption of the original Act, provides:

"Acts of 1919, 36th Legislature, Page 91: An Act creating the office of Game, Fish and Oyster Commissioner, providing for his appointment, prescribing his qualifications, defining his duties, authorizing the appointment of deputies, prescribing their qualifications, defining their powers and duties, and for the protection of the fish, oyster, turtle, terrapin, shrimp, crab, clam, mussels, lobsters and all other kinds and forms of marine life in the public fresh water, tidal and coastal waters of the state, and to protect the natural oyster beds and reefs and provide for the location of beds, prescribing terms, taxes and conditions upon which fish, shrimp, crabs, clams, turtles, terrapin, mussels, lobsters and all other forms and kinds of marine life may be taken from the waters of this State, providing that this Act shall be construed to be a continuation of all former laws on this subject, and providing that all suits now pending involving laws affected by this Act shall not abate but shall be prosecuted under such former laws and under this Act and declaring an emergency."

It is clear from the caption that there is nothing in regard to an inspection, but the only place the tax is mentioned in the caption, is prescribing the terms, tax and conditions upon which fish may be taken from the waters of this State, showing that it is the intention to tax in taking of the fish, at so much per pounds. It is agreed in the case involved that none of the fish were taken from the waters of this State, but the majority from the waters of foreign countries.

Article 16 of Chapter 73, Act of 1919, Second Special Session, page 196, shows further the purpose of the law requiring the license, and reads as follows:

"For the protection of the fish and oyster industry any individual firm engaged in, or who may engage in, the business of a wholesale dealer or dealers in fish and oysters, shall secure from the Game, Fish and Oyster Commissioner, or one of his deputies, a license granting such individual, firm, or corporation permission to engage in such occupation for one year. For the purpose of obtaining this license, the applicant desiring same must make written application to the Game, Fish and Oyster Commissioner, or one of his deputies, in which he, the applicant, shall set forth, under oath, as required, that he is a citizen of the United States by birth, or not being so, shall state that he has been granted full naturalization papers, and by what Court and in what town they were granted. Where a corporation applying for a permit to conduct a wholesale business in fish, oysters and other marine products, as mentioned, contains foreigners, it shall conform to the foregoing provisions, as applied to the individual applicant."

So the very section of Chapter 73, from which the present law was taken commences, "For the protection of the fish and oyster industry any individual, etc."

In the case of Brown vs. Maryland, 12 Wheat 419, the Court, from an examination of the law itself, declared that

the law on its face showed that it was in violation of the Constitution of the United States, being a tax on imports.

We think an examination of the present law, taken together with the history of the legislation, will show that the Act is not passed as an inspection measure, but for the purpose of protecting the fish and oyster industry of the State of Texas.

Let us examine Article 936 of the present law (Transcript of Record, page 14):

"The Act provides that any individual firm or corporation before engaging in the business, must secure from the Game, Fish and Oyster Commissioner, a license granting said individual, firm or corporation, permission to engage in said occupation for one year."

Now, what must he do before the State of Texas will grant him the right to engage in the importing business?

First, he must set forth under oath that he is a citizen of the United States by birth. In other words, a foreigner could not import fish in Texas, unless he had his full naturalization papers. In the application he must set out by what Court the papers were granted, and if it is a corporation who wants the permission, if any of the stockholders are foreigners, the stockholders must be naturalized foreigners.

Can it be seriously contended that this is an inspection tax only? The Act continues:

"He shall also agree that because of the privilege which he applied for from the State of Texas"

In other words, the State of Texas is granting him a privilege to engage in the importing of fish. For this license he must pay $10.00. In Brown vs. Maryland, 12 Wheat, 419, the fee was $50.00. In addition to the $10.00, he must pay also, in the case of the plaintiff, a tax of $1.00 on each thousand pounds of fish handled, which will

make his yearly tax about $1,000.00 a year (Transcript of Record, page 14). If anyone engages in the business without procuring a license, notice—not without paying the inspection fees, but without procuring a license to follow said business—or without paying the tax and fee required by this article, or either of these, he shall be guilty of a misdemeanor and shall be punished by a fine of not less than $50.00 and no more than $200.00, and each day constitutes a separate offense, and further that upon conviction of pursuing said occupation without the payment of the tax and fee required by law, **or for any other violation of the Game, Fish and Oyster Law, the license of said dealer shall be forfeited.** In other words, the right to engage in the business of importing fish may be forfeited by the State of Texas, not only if the tax is not paid, but if any provision of the law is violated, that is, any provision of the Game, Fish and Oyster Law. An examination of Appendix A will show the many provisions of this law, that have nothing to do with license tax or inspection tax. If for any of these violations the State of Texas will take away the privilege of engaging in the business of importing fish, the law be valid, does it now show on its face that it is as shown in Section 16, 'for the protection of the fish and oyster industry.' In other words, it is a law that will foster and develop the fish and oyster industry of the State of Texas, and to develop this industry of the State of Texas, many safeguards and restrictions are placed around the privilege of engaging in the wholesale fish dealers' business.

The facts in Brown vs. Maryland, 12 Wheat, 419, do not show any such interference with importation as does the law of the State of Texas. In the State of Texas, if a man out hunting kills too many ducks, under the Texas law he loses his right to be a wholesale fish dealer, because in his recreation moments he violated another provision of that law. If he is out fishing, and catches a fish

that is too small, and should be thrown back, and does not, he loses his right to engage in the fish and oyster business, as a wholesale dealer, because he has violated a provision of that law, and the right to engage in this business being regarded as a privilege, the State of Texas says that only a chosen few, those who obey all the laws can be wholesale fish dealers. Is such a restriction valid when it comes to importing fish? Clearly not.

An examination of the Texas law will show that practically no attention is paid to inspection. The right to inspect is reserved for the privilege of issuing the license, but at no place in the act is there any outline of what inspection may be done, and a careful examination of the entire law (Appendix 'A') will show that it was passed not to protect the public generally as a health measure, but to preserve the fish and protect the fish and oyster industry of the State of Texas, and at no place is it made unlawful to sell fish that have not been inspected, and no attention has been paid to the inspection of the fish at all. As a matter of fact, an examination of the pleadings show that no defense was made on the ground that the tax was an inspection tax. See Respondent's answer, Transcript of Record, page 6, and particularly Paragraph 7, page 8, in which the defense is outlined: First, the fish are not imports, and second, if they are imports that they did and do lose their status and identity as such by reason of the fact that plaintiff does not sell such fish in the same form and manner and package in which said fish are brought into Galveston, and that they are so acted upon as to become mixed and mingled with the general mass of property within the State of Texas.

Two briefs were filed by the respondent. Respondent's contention is shown in page 7 of their brief: "Under the facts as agreed upon in this case the defendant insists that the tax sought to be collected from the complainant is not in any sense a tax upon imports, but is an occupation or

license tax levied upon the business of wholesaling fish after same have clearly ceased to be imports, if in fact they ever constituted an import within the meaning of the law."

On page 9 of respondents trial brief they say: "A tax levied by the Statute under consideration is an occupation or license tax, a tax which a person or corporation in Texas must pay for the privilege of engaging in Texas in the business of wholesale fish dealer."

That brings us to the main proposition under this point as to whether or not the wholesale fish dealers' license law of Texas is unconstitutional as a tax on imports.

In the case of Brown vs. Maryland, 12 Wheat 419, 6 L. Ed., 678, the State of Maryland passed a statute which provided:

"All importers of foreign articles or commodities of dry goods wares or merchandise, by bale or package, of wine, rum, brandy, whiskey and other distilled spirits and other persons selling the same by wholesale, bale or package, hogshead, barrel or tierce, shall, before they are authorized to sell, take out a license, as by the original act is directed, for which they shall pay fifty dollars; and in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act, to which this is a supplement."

The penalties and forfeitures prescribed by the original act, which was passed in 1819, were a forfeiture of the amount of the license tax and a fine of $100 to be recovered by indictment.

Brown was indicted and convicted for violation of this act by refusing to take out the license. The case came up on appeal to the Supreme Court. Chief Justice Marshall starts out with the proposition as laid down by the trial court in this case at bar (page 436):

"It has been truly said that the presumption is in favor of every legislative act, and that the whole burden of proof lies on him who denies its constitutionality. The plaintiffs in error take the burden upon themselves and insist that the act under consideration is repugnant to two provisions in the constitution of the United States:

"1. That to which declares that 'no state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.'

"2. To that which declares that Congress shall have power to 'regulate commerce with foreign nations, and among the several states and with the Indian tribes.'"

Justice Marshall said (12 Wheat, 234):

"The case depends entirely upon the question of whether the Legislature of a State can constitutionally require the importers of foreign articles to take out a license from the state before he shall be permitted to sell a barrel or package so imported."

The act was held void on the ground that it was a tax on imports, and also because it was an attempt to regulate foreign commerce.

It was contended in the Brown case that the license tax was not a tax on the article itself, but on the right to do business, and also a personal tax. Chief Justice Marshall disposed of this contention as follows:

"It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article imported only for sale, is a tax on the article itself. It is true the state may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician or the mechanic must either charge more on the article in which he deals or the

thing itself is taxed through his person. This the state has a right to do, because no constitutional prohibition extends to it. So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer or by the importer himself, in like manner as a direct duty on the article itself would be made. This the state has not a right to do, because it is prohibited by the Constitution."

The Texas license law does exactly what the Maryland law attempted to do. It requires a payment of a license tax tax of $10.00 for the privilege of doing business in Texas as a wholesale fish dealer. Read Transcript of Record, page 14: "That any individual, etc., in or who may engage in the business of wholesale dealer in fish, shall secure from the Game, Fish and Oyster Commissioner, or one of his deputies, a license granting such individual, etc., permission to engage in said occupation for one year." Further on page 15, Transcript of Record, the same law provides: "He shall also agree that because of the privilege which he applies for from the State of Texas, etc.," and on page 16, Transcript of Record, the law continues, "that upon conviction of pursuing said occupation without payment of tax and fee required by law, or for any other violation of the Game, Fish and Oyster law, the license of such dealer shall be forfeited," showing clearly that the tax is an occupational tax, the same as the tax in the case of Brown vs. Maryland, 12 Wheat, 419.

The case of Brown vs. Maryland is discussed in Cooley's Constitutional Limitation, Eighth Edition, Volume 2, Page 1278, as follows:

"The State of Maryland passed an act requiring all importers of foreign goods by bale or package to take out a license for which they were to pay $50.00, and in case of neglect or refusal to take out such license subjected them to certain forfeitures and penalties. License laws were of two kinds—those which required the payment of a license fee

by way of revenue, and are therefore the exercise of the power of taxation, and those which are mere police regulations and require the payment of only such license fee as will cover the expense of the license and of enforcing the regulations.

The Maryland act seems to fall properly within the former of these classes and it was held void as in conflict with said provision in the Constitution, which prohibits a state from laying any imposts, etc., and also with the clause which declares that Congress shall have the power to regulate commerce.

The reasoning of the Court was this: Sale is the object of all importation of goods. The power to allow importation must therefore imply the power to authorize the sale of the thing imported; that consequently a penalty inflicted for selling an article in the character of importer was in opposition to the act of Congress, which authorized importation; that a power to tax an article in the hands of the importer the instant it was landed was the same in effect as the power to tax it while entering the port; that consequently the law of Maryland was obnoxious to the charge of unconstitutionality on the ground of its viloating the two provisions referred to, and the state law which required the master of every vessel sailing and engaged in foreign commerce to pay a certain sum to a state officer on account of every passenger brought from a foreign country into the state, or before landing any alien passenger, was held void for a similar reason, and it has been held that a state license tax can not be laid upon business of a corporation requiring its agent by owners of vessels engaged exclusively in interstate and foreign commerce where its business is confined to and is a necessary adjunct of their commerce, consisting in the soliciting and engaging of cargoes, nominating vessels to carry it and arranging for delivery on wharves and for stevedores, issuing bills of lad-

ing, collecting freight charges, paying ships' disbursements and other incidental matters."

The Texas license law is identical with the law in the case of Brown vs. Maryland, 12 Wheat, 419, except that in addition it attempts to levy in addition to license tax a continuous tax of $1.00 per thousand pounds on all fish handled by the dealer. In other words, before a dealer can sell any fish imported by him, no matter whether they are in their original shape or not, if all are untouched, he must take out this wholesale dealer's license. Clearly this is a tax on imports, a tax that must be paid before the imports can be sold, and clearly this is void, being within the doctrine of the case of Brown vs. Maryland, 12 Wheat, 419.

See also the License cases, 12 L. Ed., 256, 5 Howard, 505:

"The question came directly before the Court the first time the case of Brown vs. Maryland, 12 Wheat, 419, and the Court there held that an article authorized by law of Congress to be imported continued to be a part of the foreign commerce of the country while it remained in the hands of the importer for sale in the original bale, package or vessel in which it was imported, and the authority given to import necessarily carrying with it the right to sell the imported article in the form and shape in which it was imported, and that no state, either by direct assessment or by requiring a license from the importer before he was permitted to sell, could impose any burden upon him or the property imported beyond what the law of Congress had itself imposed.

"When the original package was broken up for use or for retail by the importer, and also when the commodity had passed from his hands into the hands of the purchaser, it ceased to be an import, or a part of foreign commerce, and became subject to the laws of the state, and might be taxed for the state purposes, and the sale regulated by the state like any other property.

"This, I understand, to be substantially the decision in the case of Brown vs. the State of Maryland, drawing the line between foreign commerce, which is subject to regulation of commerce, and internal or domestic commerce, which belongs to the state and over which Congress can exercise no control.

"I argued the case in behalf of the state and endeavored to maintain that the law of Maryland, which required that an importer as well as other dealers take out a license before he could sell, and for which he was to pay a sum of money to the State."

In the case of Low vs. Austin, 13 Wall, 29, 20 L. Ed., 517, 80 U. S., 456, the plaintiffs had been for several years importing, shipping and commission merchants in the City of San Francisco, State of California. In 1868 they received on consignment from parties in France champagne, wines to the value of $10,000.00, upon which they paid duties and charges of the custom house. They then stored the wine in their warehouses in San Francisco, in which the wines were imported, where they remained for sale. While in this condition they were assessed as property of the plaintiff for the State, City and County taxes, and under the general revenue laws of California. Defendant was the tax collector of the City and County of San Francisco, levied on the property and was about to sell same when the plaintiff paid the charges incurred under protest and brought this action to recover same back.

The case held that the state could not levy taxes on imports in this manner, quoting the case of Brown vs. Maryland, 12 Wheat, 419, as follows:

"The decision of this Court in the case of Brown vs. Maryland, 12 Wheat, 419, furnishes the answer to this question. The distinction between that case and the present case does not affect the principle affirmed, which equally governs both. In that case the question rose whether the act of the Legislature of Maryland, requiring importers of

foreign goods by bale or package to pay the license before selling them in the form and condition in which they were imported, was valid and constitutional. The Court held the act in conflict with the provision of the Constitution, which declares that no state shall, without the consent of Congress, lay any impost or duty on imports or exports except what may be absolutely necessary for executing its inspection laws. * * * In that case it was also held that the authority given to imports necessarily carries with it the right to sell the goods in the form and condition, that is, in the bale or package in which they were imported, and that the exaction of a license tax for permission to sell in such case was not only invalid as being in conflict with the Constitutional prohibition upon the state, but also as an interference with the power of Congress to regulate commerce with a foreign nation."

The doctrine of Brown vs. Maryland has been recognized by the Supreme Court as late as the case of Sonneborn Bros. vs. Keeling, 262 U. S., 506, 67 L. Ed., 1095, in which case Mr. Justice Taft said:

"The reasoning is based on the supposed analogy of the immunity from taxation of imports from foreign countries, which lasts until the article has been sold or has been taken from its original package of importation, and added to the mass of merchandise of the state. This immunity of imports was established by this case in Brown vs. Maryland, 12 Wheat, 419, 6 L. Ed., 678, and was declared in obedience to the prohibition of the Constitution contained in Section 10, Article 1, Paragraph 2, providing that:

"No state shall, without the consent of Congress, lay any impost or duties on imports or exports except what may be absolutely necessary for the execution of its inspection laws."

The whole point is that the sale was part of the importation. It is the article itself to which the immunity attaches, and whether it is in transit or is at rest, so long as it is in the form and package in which imported and in the

ustody and ownership of the importer, the state may not ax it.

This prohibition against the state taxing imports has een enforced as against a license or occupation tax on the mporter in Brown vs. Maryland, 12 Wheat, 419, 6 L. Ed., 78, as against a personal property tax on a stock of wines f a wine dealer to the extent to which the stock included mported wines in the original package; Low vs. Austin, 3 Wall, 29, 20 L. Ed., 517; and as against an occupation ax on auctioneer measured by his commission on the sale f such imports; Cook vs. Pennsylvania, 97 U. S., 566, 24 L. Ed., 1015.

The above authorities, we believe, establish the fact hat the State can not levy any form of tax directly or indirectly that is a tax on imports so long as they are in the ands of the original importer, and so long as they have not een commingled and mixed with the general property of he state, and that the case of Brown vs. Maryland is the aw today so recognized, holding that to require an importer to take out a license constitutes a tax on the import.

For the reasons above set forth, we respectfully urge hat the trial court erred in refusing injunctions, and respectfully pray that the judgment of the trial Court be reversed, and that injunction be granted as prayed for in said Petition.

BRANTLY HARRIS
Solicitor for Appellant.

Copy of this Brief received by

undersigned this, the ..... December, 1927.

Solicitor for Appellee.

APPENDIX.

CHAPTER 73 OF THE GENERAL LAWS OF THE THIRTY-SIXTH LEGISLATURE OF TEXAS SECOND CALLED SESSION, Page 191.

RELATING TO THE DUTIES OF THE GAME, FISH AND OYSTER COMMISSIONER AND PROTECTION OF MARINE LIFE.

An act creating the office of Game, Fish and Oyster Commissioner; providing for his appointment; prescribing his qualifications; defining his duties; authorizing the appointment of deputies; prescribing their qualifications; defining their powers and duties; and for the protection of fish, oysters, turtles, terrapins, shrimp, crabs, clams, mussels, lobsters and all other kinds and forms of marine life in the public fresh water, tidal and coast waters of the State and to protect the natural oyster beds and reefs and to provide for the location of private beds, prescribing the terms, tax and conditions upon which fish, shrimp, crabs, clams, turtles, terrapins, mussels, lobsters and all other forms and kinds of marine life may be taken from the waters of this State; providing that this Act shall be construed to be a continuation of all former laws upon the subject; and providing that all suits now pending involving laws affected by this Act shall not abate but shall be prosecuted under such former laws and under this act, and declaring an emergency:

Be it enacted by the Legislature of the State of Texas:

Article 1. The office of the Game, Fish and Oyster Commissioner is hereby created and the the Governor of the State is authorized to appoint a competent person as Game, Fish and Oyster Commissioner of the State of Texas.

Article 2. The person appointed to the office of Game, Fish and Oyster Commissioner shall be a citizen of the United States and of the State of Texas.

Article 3. The Game, Fish and Oyster Commissioner shall have his office in the State Capitol in the City of Austin, Texas, during his term of office, which shall be two years.

Article 4. The Game, Fish and Oyster Commissioner shall file with the Secretary of State a good and sufficient bond, to be approved by that official, in the sum of ten thousand dollars, with two or more good and sufficient securities, conditioned that he will faithfully perform the duties of his office. He shall take the oath prescribed for sheriffs, and when he shall have filed said bond and taken said oath, he shall enter on the duties of his office. Said bond shall not be void on the first recovery, but may be sued on from time to time in the name of the State or any persons injured until the whole amount has been recovered.

Article 5. The Game, Fish and Oyster Commissioner shall have a seal on which shall be a five-pointed star and the words "Game, Fish and Oyster Commissioner of Texas," and which seal he shall use in issuing commissions to deputies in his department and in other official acts.

Article 6. The duties of the Game, Fish and Oyster Commissioner shall be in the execution of the Game, Fish and Oyster laws of the State and such further duties as may be imposed upon him by legislation. In the execution of these laws he shall exercise the power and authority given to the sheriffs of the state.

Article 7. All of the public rivers, bayous, lagoons, creeks, lakes, bays and inlets in this State, and all that part of the Gulf of Mexico within the jurisdiction of this State, together with their beds and bottoms, and all of the products thereof, shall continue and remain the property of the State of Texas, except in so far as the State shall permit the use of said waters and bottoms, or permit the taking of the products of such bottoms and waters, and in so far as this use shall relate to or affect the taking and conservation of fish, oysters, shrimp, crabs, clams, turtle, terrapin, mussels, lobsters and all other kinds and forms of marine life, or relate to sand, gravel, marl, mudshell and

all other kinds of shell, the Game, Fish and Oyster Commissioner shall have jurisdiction over and control of in accordance with and by the authority vested in him by the laws of this state.

Article 8. All oyster beds shall be public or private; all not designated private shall be public. All natural oyster beds and oyster reefs of this State shall be deemed public, and a natural oyster bed shall be declared to exist when as many as five barrels of oysters may be found therein within twenty-five hundred square feet of any position of said reef or bed; and any lands covered by water containing less oysters than the above amount shall be subject to location at the discretion of the Game, Fish and Oyster Commissioner, but this shall not apply to a reef or bed that has been exhausted within a period of eight years.

Article 9. Whenever any creek, bayou, lake or cove shall be included within the metes and bounds of any original grant or location of land in this State, the lawful occupant of such grant or location shall have the exclusive right to use said creek, lake, bayou or cove for gathering, planting or sowing oysters within the metes and bounds of the official grant or patent of said land. Provided, that the Game, Fish and Oyster Commissioner may require the owner of oysters produced on such lands, when such oysters are offered for sale, to make an affidavit that such oysters were produced on this land. And the failure of the person claiming that such oysters were produced on his private oyster bed or bottoms, to have and to show such affidavit to the Game, Fish and Oyster Commissioner, or one of his deputies, or to the person to whom he offers such oysters for sale, shall be presumptive that such oysters were taken from a public bed, and on prosecution for the same, it shall devolve on the defendant to show that such oysters were taken from his private bed, or bottom, of oysters. No person shall locate water or ground, covered with water, for planting oysters along any bayshore in this State, nearer than 100 yards from the shore.

Article 10. There shall be and is hereby levied a tax of not less than one-fifth of one per cent per pound on all fish and shrimp taken and sold or offered for sale in this State, and not less than two cents a barrel on all oysters

sold or offered for sale in this State, whether from private or public beds and offered for sale or shipment, and not less than one-half a cent per pound on all turtles, and not less than twenty-five cents on each terrapin offered for sale and shipment. Such tax shall be paid under such rules and regulations as the Game, Fish and Oyster Commissioner shall prescribe. For all purposes mentioned in this Title or Section, a barrel of oysters shall be deemed and taken to consist of three boxes of oysters in the shell, said boxes to be of the following dimensions: Ten inches wide by twenty inches deep and thirteen and one-half inches in depth. In filling such boxes for measurement, such oysters shall not be placed or deposited in such box in a way that will make them fill the box more than two and one-half inches in the center above the height of the box. Provided that two gallons of shucked oysters without their shells shall be considered and deemed by this Act as equal to one barrel of oysters in the shell. It is hereby specially provided that the title to the shells from which oysters are taken shall remain in the State, and the Game Fish and Oyster Commissioner is directed to handle, control or sell same under the same rules and regulations as fixed by law, or may hereafter be fixed by law for the handling, control or sale of other shells or mudshell taken from the tidal waters of the State.

Article 11. The Game, Fish and Oyster Commissioner is hereby authorized and empowered to collect all taxes and licenses, fines and forfeiture and all money due said department by deputies or persons specially employed for that purpose.

Article 12. Any person who shall use any measurement other than that established in Article 10 of this Act for the measurement of oysters in the purchase and sale of oysters shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in a sum of not less than ten and not more than twenty-five dollars, and any person who shall fill the measuring box, as adopted in Article 10 of this Act, in the buying and selling of oysters, higher than two and one-half inches in the center of such measuring box shall be deemed guilty of a misdemeanor, and on conviction shall

be fined in a sum of not less than ten nor more than twenty-five dollars.

Article 13. Any person who shall not pay or who shall refuse to pay the tax imposed on the purchase and sale of fish, oysters, turtle, terrapin and shrimp, as imposed in Article 10 of this Act, or who shall not pay or shall refuse to pay the taxes established and fixed by the Game, Fish and Oyster Commissioner in Article 10 of this Act, shall be deemed guilty of a misdemeanor, and on conviction shall be fined in the sum of not less than fifty nor more than one hundred dollars, and if such person shall be a licensed fish dealer or fisherman or oysterman his license as a fish dealer or fisherman shall be canceled and not reissued for a period of three years.

Article 14. Any person who is a citizen of the United States wishing to use a boat in catching or taking fish, green turtle, terrapin or shrimp or gathering oysters or other marine life for market in public waters of this State in accordance with the provisions of the fish and oyster laws of this State, shall apply to the Game, Fish and Oyster Commissioner or his deputies for permission to do so. Such applicant shall furnish said officer under oath his name, place of residence, the name and kind of boat to be used by him, together with the number of men to be employed by him. Thereupon the officer shall register such boat, which register number shall be distinctly painted, as the Game, Fish and Oyster Commissioner may designate, on such boat, for which registration he shall pay the said officer one dollar and fifty cents, and the said officer shall furnish the applicant with a certificate of such registration, and such certificate shall be for twelve months from date of issuance.

Article 15. Any captain or master of any boat wishing to engage in the business of catching or taking any fish, turtle, terrapin, shrimp or oysters or other marine life from the waters of the State for market shall, before engaging in such business, secure from the Game, Fish and Oyster Commissioner or one of his deputies, a license granting him permission to take from the waters of the State fish, turtle, terrapin, shrimp or oysters; provided, that the license in exercising the privilege named in this license shall

at all times be governed by the fish and oyster laws of this state. For the purpose of obtaining this license the person desiring same must make written application to the Game, Fish and Oyster Commissioner, or one of his deputies, in which he, the applicant, shall set forth under oath that he is a citizen of the United States, and the name, class and register number of his boat. If the application be for a license to use seines and nets the applicant shall state the number, class and length of the seines and nets to be used by him, and if the application be for a license to gather oysters he must state the number of tongs to be used by him, and the applicant shall also agree that because of the privilege he shall receive from the State of Texas of taking fish, turtle, terrapin, shrimp or oysters from her waters, or the marine life, all such products at all times shall be subject to inspection by the Game, Fish and Oyster Commissioner or any of his deputies, and that said application shall authorize said Commissioner, or any of his deputies, to enter at any time the boat or any house or place where he, the applicant, may have such from her waters or the marine life, all such products at all times, shall further agree to pay to the State of Texas a special tax provided for in Article 10 of this Act. This application having been duly executed and handed to the Game, Fish and Oyster Commissioner, or any of his deputies, accompanied by the applicant's registration certificate and the fee for the license applied for, it shall thereupon be the duty of the Game, Fish and Oyster Commissioner, or the deputy receiving same, to issue to the applicant a license to engage in the business set forth in his application, and the license shall be subject to such limitations and control as herein prescribed and as is or may be prescribed by the laws of this State. Said license must be signed by the Game, Fish and Oyster Commissioner or his deputy, stamped with the seal of office and state the name of the licensee, name and class of his boat, and the date of issuance. Such license shall be for twelve months if for fishing for fish, turtle or shrimp, and from September the 1st to April 1st, following the date of license, if for gathering oysters; and from November the 1st to February the 1st, inclusive, if granted for the purpose of catching terrapin,

and for said license the applicant shall pay the sum of one dollar. The license so issued shall be kept on the boat, subject to the inspection of the Game, Fish and Oyster Commissioner or any of his deputies, and it shall not be good for any other person nor on any other boat than the original named therein without the consent of the Game, Fish and Oyster Commissioner or one of his deputies having first been had, which consent or assignment shall be written across the face of said license; provided that if at any time such licensed captain or master of a boat shall violate any of the fish and oyster laws of this state, or shall at any time refuse to comply with any provision made in his application for license, the Game, Fish and Oyster Commisisoner is authorized to cancel said license and the boat registration certificate, notice of which shall be given by the Fish and Oyster Commissioner in writing and delivered to the licensee, and such license to such captain, and the registration of such boat shall not be renewed for three years. Any person wishing to engage in the taking or catching of any fish, turtle, terrapin, shrimp or oysters for market as the employe of the owner or as a part of crew of any registered boat, shall procure a license in the same manner and character as the captain or master of any registered boat engaged in taking or catching fish, turtle, terrapin, shrimp or oysters or other marine life for market; provided, that one license so issued under this Article shall authorize the licensee to engage in taking or catching any of the products named herein.

Article 16. For the protection of the fish and oyster industry, any individual, firm or corporation engaged in or who may engage in the business of a wholesale dealer or dealers in fish and oysters, shall secure from the Game, Fish and Oyster Commissioner, or one of his deputies, a license granting such individual, firm or corporation permission to engage in said occupation for one year. For the purpose of obtaining this license the applicant desiring same must make written application to the Game, Fish and Oyster Commissioner, or one of his deputies, in which he (the applicant) shall set forth under oath, if required, that he is a citizen of the United States by birth, or not being so shall state that he has been granted full naturalization pa

pers and by what court and at what time they were granted. Where a corporation applying for permit to conduct a wholesale business in fish, oysters and other marine products as mentioned contains foreigners, it shall conform to the foregoing provision as applied to individual applicants. He shall also agree that, because of the privilege which he applies for from the State of Texas, that all products handled by him shall at all times be subject to the inspection of the Game, Fish and Oyster Commissioner or any his of his deputies; and in said application he shall authorize said Commissioner or any of his deputies to enter his place of business, or any place where he may have such products stored, and inspect same. He shall also agree to keep a correct record of all fish, oysters, shrimp and other taxed marine life handled by him under this law in a book to be furnished by the Game, Fish and Oyster Commissioner; and further, that failure on his part to keep a correct record shall be grounds for the forfeiture of his license granted him under the application aforesaid. This application, having been duly executed and delivered to the Game, Fish and Oyster Commissioner, or any of his deputies, together with a fee of ten dollars for same, it shall be the duty of the Game, Fish and Oyster Commissioner, or his deputy, to issue to the applicant a license to engage in the business set forth in the application. Said license must be signed by the Game, Fish and Oyster Commissioner, or one of his deputies, stamped with the seal of his office, and state the name of the licensee, place of business and the kind of license applied for, and shall be good for twelve months following the date of issuance. For such license the applicant shall pay one dollar for each one thousand pounds of fish handled by him, and a tax of one cent per barrel on oysters handled by him, which tax shall be paid monthly, the tax to be paid on the first of each month, which may be due upon the said product handled during the preceding month as shown by the record books hereinbefore mentioned. And any person, firm or corporation or association of persons or any officer, agent or employe of any company, corporation or association of persons who shall engage in the business of a wholesale dealer in fish and oysters or either without procuring a license to follow

said business or without paying the tax and fee required by this article shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than one hundred dollars nor more than two hundred dollars; and each day such business may be engaged in in violation of this article shall constitute a separate offense, and upon conviction for pursuing said occupation without payment of the tax and fee required by law or for any other violation of the game, fish and oyster law, in the meaning and definition of this Act in any person, corporation or firm or partnership engaged in the business of buying and selling fish, oysters, shrimp, turtle, terrapin, crabs, clams, lobsters or other commercial marine life.

Article 17. The applicant for any license under this Act, based upon fish and oysters handled, shall, upon the issuance of such license, deposit with the Game, Fish and Oyster Commissoner, if required to do so by such officer, an amount of money to be fixed by the said commissoner, in addition to the ten dollars required by him as a wholesale dealer as defined in Article 16, sufficient to cover the estimated amount of tax that would be due by applicant upon monthly business of applicant, and against which deposit the tax due may be charged by the commissioner, and said applicant shall make additional deposits in sufficient amounts to at all times maintain a deposit sufficient to cover the estimated tax that may be due by applicant, which additional deposit shall be made upon request of the Game, Fish and Oyster Commissioner.

Article 18. Any person who is a citizen of the United States, or any corporation having been chartered in this State shall have the right of obtaining a location for planting oysters and making private oyster beds within the public waters of this State by making written application to the Game, Fish and Oyster Commissioner, or his deputy, describing the location desired. A fee of twenty dollars cash must accompany such application.

Article 19. When the application and fee provided for in Article 18 has been placed in the hands of the Game, Fish and Oyster Commissioner it shall then be the duty of the Game, Fish and Oyster Commissioner, or his deputy, to examine thoroughly the location desired as soon as prac-

ticable, with tongs, dredge or any other efficient manner; and if the same be not a natural oyster bed or reef and exempt from location by any section or article of this chapter, he shall have the location surveyed by a competent surveyor. In making said location, said surveyor shall plant two iron stakes or pipes on the shore line nearest to the proposed location, one at each end of the proposed location, which said stakes or pipes shall be not less than two inches in diameter and be set at least three feet in the ground. Said stakes or pipes shall be placed with reference to bearings of not less than three natural or permanent objects or land marks. And the locator shall place and maintain under the direction of the Game, Fish and Oyster Commissioner, or his deputy, a buoy at each corner of his oyster claim farthest from the land. All locations for private oyster beds shall be made outside of the riparian limits as defined in the law relating thereto.

Article 20. The Game, Fish and Oyster Commissioner, or his deputy, shall give the locator a certififate signed by the Game, Fish and Oyster Commissioner and stamped with the seal of his office; such certificate shall show the date of applicaffon, date of survey, number, description of metes and bounds with reference to the points of the compass and natural and artificial objects by which said location can be found and verified. And the locator shall, before such certificate is delivered to him, pay the Game, Fish and Oyster Commissioner or his deputy, surveyor's fees and all other expenses connected with establishing such location. If such sums, as costs of the location and establishment of the claim, are less than twenty dollars paid to such commissioner or deputy, the difference in amount shall be returned to such locator by the Commissioner or deputy. If such expenses amount to more than twenty dollars the deficit shall be paid to the Game, Fish and Oyster Commissioner by the locator.

At any time not exceeding sixty days after the date of such certificate of location, the locator must file same with the county clerk of the county in which the location is situated, who shall record the same in a well-bound book kept for that purpose, and the original with a certificate of registration shall be returned to the owner or locator; the clerk

shall receive for the recording of such certificate the same fee as for recording deeds; the original or certified copies of such certificate shall be admissible in evidence under the same rule governing the admission of deeds or certified copies thereof.

Article 21. Any person so locating shall be protected in his possession thereof against trespass thereon in like manner as freeholders are protected in their possessions as long as he maintains all stakes and buoys in their original and correct position and complies with all laws, rules and regulations governing the fish and oyster industries.

Article 22. No person, firm or corporation shall ever own, lease or otherwise control more than one hundred acres of land covered by water, the same being oyster locations under this chapter, and within the public waters of this State; and any person, firm or corporation that now holds more than one hundred acres of oyster locations shall not be permitted hereafter to acquire, lease or otherwise control more; provided that no corporation shall lease or control any such lands covered by water unless such corporation shall be duly incorporated under the laws of this State.

Article 23. Any person, firm or corporation who has secured, or may hereafter secure, a location for a private oyster bed in this State, shall keep the two iron stakes or pipes and buoys as provided for in Article 19, in place and shall preserve the marks so long as he is the lessee of said location; and this shall appply also to any person, firm or corporation acquiring any location by purchase or transfer of any nature, and said locator or the assignee of said locator shall have the right to fence said location or any part thereof; provided, that said fence does not obstruct navigation through or into a regular channel or cut leading to other public waters.

Article 24. The owner or locator of private oyster beds under provisions of the foregoing articles shall not be required to pay any rentals on such locations for a period of five years, or till such time as he shall begin to market or sell oysters from such location or bed. When such locator shall begin to sell or market oysters from such location

he shall pay the State one dollar and fifty cents per acre per annum and two cents a barrel or such tax as may be imposed under Section 10 of this Act on oyster sales, and failure to pay such rental by the 1st day of March each year shall annul and be a forfeiture of his lease. And if oysters are not marketed or sold from such location within five years from the date of location, such location shall become void.

Article 25. Any person who is a citizen of the State of Texas, or any corporation chartered by the said State of Texas to engage in the culture of oysters or transact business in the purchase and sale of oysters and fish and composed of American citizens wishing to plant oysters on their own oyster locations or to take oysters from oyster reefs and public waters of the State of Texas for the purpose of preparing them for market, shall make application to the Game, Fish and Oyster Commissioner for permission to do the same. In such application the applicant shall set out distinctly the purpose for which he desires such oysters, and also the amount or number that he desires to take from the beds and waters mentioned. The Game, Fish and Oyster Commissioner may grant such permit, or he may refuse to do so. But if he should grant such permit he shall require the applicant to take the oysters he is authorized to take from beds or reefs designated by such commissioner and name them in the permit; he shall mark off the exact area of such beds or reefs from which such oysters shall be taken; he shall designate the bottoms on which such oysters shall be deposited if they are taken to be prepared for market; he shall require the applicant to cull the oysters taken on the grounds where they are to be located; he shall state what implements, such as tongs and dredges shall be used in taking such oysters, and he shall make and enforce all the other regulations he may think necessary to protect and conserve the oysters on the reefs and beds from which the applicant hereinbefore mentioned is permitted to take oysters. When any person or corporation takes oysters under the provisions of this act from the public reefs for planting purposes and places them on his or its own private bed or reef, or takes oysters from such public reefs

or beds for the purpose of preparing them for market, and places them on such beds or bottoms designated by the Game, Fish and Oyster Commissioner where they may be prepared for market, such oysters shall become the personal property of the person or corporation planting them in the first instance or depositing them in the second instance. Provided, that the person or corporation planting the oysters or depositing them for preparation for market shall, by buoys or stakes or by fencing, clearly and distinctly mark the boundaries of the bed planted or the boundaries of the deposit of oysters made for preparation for market; and no prosecution of anyone shall be permitted for taking such oysters unless the boundaries of the private beds and the boundaries of the deposit for the market preparation are established and maintained.

Article 26. Any person taking the oysters placed on private reefs or any person taking oysters from beds or deposits made for the purpose of preparing them for market without the consent of the owner of the private reef or of the owner of the oysters who has deposited them to prepare them for market, under the provisions of the foregoing Article 25, shall be deemed guilty of theft and on conviction shall be punished by confinement in the penitentiary for a term of not less than one year and not more than two years.

Article 27. Any person who is an American citizen desiring to fish in the public waters of this State, or fish for oysters, fish, shrimp, turtle, terrapin, clams, crabs or other marine animal life for the purpose of selling them, shall procure from the Game, Fish and Oyster Commissioner, or his deputy, a license to do so, and such person shall pay the fee of one dollar for such license, which shall be for one year from the date thereof, and obligate the holder to observe all the laws of the State enacted to conserve the marine life of such public waters. Any person who fishes in the public waters of this State for oysters, fish, shrimp, turtle, terrapin, crabs, clams and other marine life for market or sell such product of such waters without first procuring a license to do so, shall be deemed guilty of a misdemeanor and on conviction shall be fined in a sum of not less than ten and not more than fifty dollars.

Article 28. It shall be the duty of any person fishing for market or for the sale of the marine life set forth in Article 27, in the waters of this State, to carry with him the license to do so as issued him as provided in said Section 27, and shall show it to the Game, Fish and Oyster Commissioner when requested to do so. Any person having such license and refusing to show it to the Commissioner or his deputy as aforesaid, when requested to do so, shall on conviction be fined in a sum of not less than five nor more than twenty-five dollars.

Article 29. Any person who shall deface, injure or destroy or remove any buoy, markers or fence or any parts thereof, used to designate or enclose a private oyster bed or a location where oysters have been deposited to be prepared for market without the consent of the owner thereof any bouy, marker or sign placed or used by the Game, Fish and Oyster Commissioner for the purpose of designating any waters closed against fishing or oyster taking, without the consent of the Game, Fish and Oyster Commissioner, shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than fifty nor more than two hundred dollars.

Article 30. It shall be unlawful for any person to catch or attempt to catch any fish, green turtle, loggerhead, terrapin or shrimp in any of the bays or navigable waters of this State, within the limits or within one mile of the limits of any city or town in this State, with seines, drags, fykes, set nets, trammel nets, traps, dams or wires. A town or city in the meaning of this Act shall be a collection of one hundred families within an area of one square mile. Anyone violating any of the provisions of this Act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than twenty-five nor more than two hundred dollars. In all prosecutions under the provisions of this Act the identification of the boat from which such violation or violations occur shall be prima facie evidence against the owner, lessee, person in charge or master of such boat. It shall be the duty of such town to establish and maintain the buoys, stakes or other marks designating the limits of the one

mile within which such seines shall be hauled and such nets set.

Article 31. The mesh of all seines and nets used for taking fish in the salt waters of this State, not including the bag, shall not be less than one and one-half inches square mesh. The mesh of the bags and for fifty feet on each side of the bags shall not be larger than a one-inch square mesh. No seine of over fifteen hundred feet shall be dragged or pulled in the salt waters of this State, and any person dragging such seine or dragging two seines which are connected or tied together to secure a longer haul than fifteen hundred feet, shall be deemed guilty of a misdemeanor, and on conviction shall be fined in a sum of not less than twenty-five nor more than one hundred dollars. And the Game, Fish and Oyster Commissioner shall destroy such seines of illegal length or tied together or connected for unlawful use as a nuisance, and no suit shall be maintained against him therefor.

Article 32. All seines and nets used in the salt waters of this State shall be examined by the Game, Fish and Oyster Commissioner, or one of his deputies, to see that they conform to the requirements of this law as to length and size of mesh, and if they are found to conform to such requirements, the Game, Fish and Oyster Commissioner shall tag such seines or nets with a metal tag on which shall be indented the number of such seine and net; the cost of such tag, twenty-five cents, to be paid by the owner of such seine or net. The Game, Fish and Oyster Commissioner shall then issue, to the owner of it, a permit to use such seine or net for one year from the date of such permit. And such permit shall state the name of the owner of such net, the date on which it was issued, the size of the mesh and the length and kind of such net. The Game, Fish and Oyster Commissioner shall keep a record book in which the date of the issuance of such permit, the name of the owner, the number of the tag, the size of the mesh and the length of such seine or net shall be kept. It shall be the duty of the owner of the seine or net to keep the tag attached to such seine or net, and where a seine or net is used without such tag being attached, it shall be prima facie evidence that such net is an unlawful seine or net and is

hereby declared to be a nuisance, and the Game, Fish and Oyster Commissioner shall abate and destroy the same and no suit for damages for such destruction shall be brought against him therefor. Any person who shall drag, haul or set any net in the salt waters of this State without first having such net examined by the Commissioner aforesaid, and tagged and a permit as provided for in this Article issued by the Game, Fish and Oyster Commissioner, or his deputy, shall be deemed guilty of a misdemeanor and on conviction he shall be fined in a sum of not less than twenty dollars and not more than one hundred dollars, and the seine or net shall be destroyed as herein provided as a nuisance.

Article 33. Any person leasing an oyster claim or oyster reef in waters where seining is prohibited may apply to the Game, Fish and Oyster Commissioner for permission to seine for drumfish in such waters. In his application he shall make oath that the drumfish are seriously damaging his oysters, and that if he is permitted to seine for such drumfish in such waters he will not take or destroy any other food fish, but will throw them back into the water. If the Commissioner is satisfied that such damage is being done he may grant such permission to the person applying for it, specifying in such permit the length of time in which it is to be used, and the claim or reef on which it is to be used. And such Commissioner shall assign a deputy fish and oyster commissioner to superintend such seining and no seine shall be dragged except in his presence, and for which a person obtaining the permission to seine, as set forth above, shall pay to the Game, Fish and Oyster Commissioner $2.50 per day, to be placed in the special fish and oyster fund, for such services. The person granted such permission shall board the deputy fish and oyster commissioner during his superintendence of seining. If the person obtaining the permission shall violate any of the provisions of this Act he shall be prosecuted and punished under the criminal laws of this State applicable in such cases.

Article 34. Any person who shall take, catch, ensnare or trap any fish by means of nets or seines or by poisoning, polluting or by use of any explosives, or by muddying,

ditching or draining in any lake, pool or pond in any county within this State without the consent of the owner of such lake, pool or pond, shall be deemed guilty of a misdemeanor and on conviction shall be fined in a sum of not less than ten and no more than one hundred dollars, and in all prosecutions under this law the burden of proof of such consent of the owner shall devolve and be upon the defendant.

Article 35. The catching, taking or killing of fish, green turtle or terrapin in any of the salt waters or fresh waters, lakes or streams in the State by poison, lime, dynamite, nitroglycerin, giant powder or other explosives, or by the use of any drugs, substances or thing deleterious to fish life, is hereby prohibited; and any person offending against this article shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than twenty-five dollars, nor more than two hundred dollars, and by confinement in the county jail not less than thirty nor more than ninety days.

Article 36. It shall be unlawful for any transportation company operating within this State, its officers, agents or employes to receive for shipment, or to ship within the boundaries of this State, from the first day of May to the first day of September of any year, any oysters from any public bed or reef for depositing or for marketing; provided that nothing in this chapter shall be construed as to prohibit any such transportation company, its officers, agents or employes from shipping or receiving for shipment any oysters taken from a private bed located under the laws of this state, offered for shipment by the owner or owners, locator or locators of such bed, such fact to be established by the written affidavit of the person or persons offering such oysters for shipment, made before an officer authorized to take oaths. Any officer, agent or employe of such transportation company violating the provisions of this Section shall be deemed guilty of a misdemeanor and upon conviction shall be fined for each offense not less than ten and not more than one hundred dollars.

Article 37. It shall be the duty of every person, firm or corporation, municipal or private, who has heretofore

erected or who may hereafter erect any dam, water weir or other obstruction on any regular flowing stream within this State, on the written order of the Court of County Commissioners in the county in which such dam, weir or other obstruction has been erected or constructed, to build, construct and keep in repair fish ways, or fish ladders, at such dam, water weir or obstruction, at the discretion of the Game, Fish and Oyster Commissioner, so that at all seasons of the year fish may ascend above such obstruction to deposit their spawn. Any person, firm or corporation, whether private or municipal, who shall erect such dam, weir or obstruction or any firm, person or corporation, whether private or municipal, who shall own or maintain any such dam, obstruction, or weir, who shall fail or refuse to build, construct and keep in repair such fish way or fish ladder within ninety days after having been notified by the Game, Fish and Oyster Commissioner of this State to do so, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than $25.00 nor more than $500.00; provided, that each week after the expiration of 90 days after receiving notice, as herein provided, that such persons, firms or corporations, municipal or private, shall fail or refuse to build, construct and keep in repair such fish ladder, shall constitute a separate offense.

Article 38. It shall be unlawful for any person to fail or refuse to scatter the culls of such oysters as he may take from the oyster reefs as directed by the Game, Fish and Oyster Commissioner, and any person so failing or refusing to scatter such culls, as directed by the Commissioner, shall be deemed guilty of a misdemeanor and on conviction he shall be fined in a sum not less than ten, nor more than one hundred dollars. And on such conviction the Game, Fish and Oyster Commissioner may cancel the license of the captain of the boat on which such person is employed or for which he is gathering oysters, and he shall also cancel the license to gather oysters of such person offending, and no new license shall be issued to such captain or to such person convicted for a period of three years.

Article 39. It shall be unlawful for any person to catch any fish in the tidal or coastal waters of the State during the months of June, July and August of each year by the use or employment of any drag seine or net, or to drag any seine or net or other device, except a minnow seine for catching bait of not more than twenty feet in length or a shrimp seine as hereinafter provided in Article 50 of this Act, in such coastal and tidal waters; and it shall be unlawful for any person at any time to place or set or drag any net or seine or use any other device or method for taking fish, other than with the ordinary pole and line or cast net, or minnow seine for catching bait of not more than twenty feet in length, within the waters of San Luis Pass, which leads from Matagorda Bay to the Gulf of Mexico; Brown's Cedars Pass, which leads from Matagorda Bay to the Gulf of Mexico, Pass Cavallo, which leads from Matagorda Bay to the Gulf of Mexico, between the town of Matagorda and the mount of Caney Creek; Cedar Bayou which leads from Mesquite Bay to the Gulf of Mexico; Aransas Pass which leads from Aransas Bay to the Gulf of Mexico; Corpus Christi Pass which leads from Corpus Christi Bay to the Gulf of Mexico; and all other passes, or within the waters of any pass, stream or canal within the Gulf of Mexico, or within one mile of such passes, or within the waters of any pass, stre am or canal leading from one body of Texas bay or coastal water into another body of such water. And the Game, Fish and Oyster Commissioner, whenever he has reason to believe it is best for the protection and conservation and increase of fish life, or to prevent their destruction in the bays or part thereof, or such tidal waters of the State, to close such bays or part thereof, or such tidal waters of the State, to close such bays or parts thereof, or such tidal waters against all forms and kinds of seining or netting or using gigs, spears and lights, he is hereby authorized to close such waters against fishing with any seine, net, spears, gigs, lights or other devices, except with a hook and line or cast net or minnow seine of not more than twenty feet in length. But before such closing of bays or part thereof,

or of other tidal waters against such seining and netting, and the using of gigs, spears and lights, the Game, Fish and Oyster Commissioner shall give notice of his intention to close such bays, or parts thereof or such tidal waters for two weeks prior to such closing by posting notices near such waters, and after the date set for such closing and which shall appear in such notices of the proposed closing of such waters, it shall be unlawful to drag a seine, or set a net or use a gig, spear or light in taking fish in such bays and parts of bays and such tidal waters for that period of time that the said Commissioner shall, in such notices, declare they shall be closed. Any person who shall drag any seine or set any net or use any gig or spear or light to take fish in such closed waters, shall be deemed guilty of a misdemeanor, and on conviction shall be fined in a sum of not less than twenty-five nor more than two hundred dollars, and shall be confined in the County jail for a term of not less than thirty nor more than ninety days, and any net, seine or boat used or employed in the violation of this Act shall be and is hereby declared a nuisance, and the Game, Fish and Oyster Commissioner or his deputy shall abate and destroy the same, and no suit shall be maintained in the Courts against him for such abatement and destruction.

Article 40. Any person who shall carry on, or over, or into the waters of such passes leading from the inland bays or tidal waters of this State to the Gulf of Mexico, any seine or net except a cast net used for catching bait, or a minnow net not exceeding twenty feet in length, or shall carry by vehicle or in any other way, any seine or net except a cast net used for catching bait or a minnow seine not exceeding twenty feet in length, to any point or place within one mile of such passes, or shall have in his possession within one mile of such passes any net or seine except a cast net for catching bait, or a minnow seine not exceeding twenty feet in length, shall be deemed guilty of a misdemeanor, and on conviction, shall be fined in a sum not less than twenty-five dollars and no more than two hundred dollars, and shall be confined in the county jail for not less than thirty nor more than ninety days. And any boat or vehicle used in carrying any seine or net,

except a cast net used for catching bait, or a minnow seine more than twenty feet in length, into or on or over waters of such passes, and any seine or net carried into or found within one mile of such passes, or found in the possession of anyone within one mile of such passes, shall be and is hereby declared a nuisance, and it shall be the duty of the Game, Fish and Oyster Commissioner, or his deputies, to abate and destroy the same, and no suit shall be maintained in the courts against them for such abatement and destruction. Provided nothing in this law shall apply to the carrying of nets and seines over closed waters within one mile of any town.

Article 41. Nothing in the foregoing articles shall apply to vessels engaged in carrying freight or passengers and engaged as sea going vessels in coast and foreign trade, and licensed and recognized as such by the Federal Government. And provided further that the Game, Fish and Oyster Commissioner may grant permits to persons desiring to fish, to carry their boats, nets and seines, and vehicles into, over and on such passes or closed waters, or on land to within the mile limits of such passes, and at what time such boats, vehicles, nets and seines shall be taken away from such mile limit and such passes.

Article 42. In all prosecutions under Article 39 and 40 of this Act, the identification of the boat or vehicle or the seine or net by which or from which the violation of the law occurred, shall be prima facie evidence against the owner or the party last in charge of such boat or against the owner of the vehicle or seines or net.

Article 43. The Game, Fish and Oyster Commissioner is hereby authorized to permit the use of any shrimp seine or other device for catching shrimp in the tidal waters of this State. Any person desiring to use such seine shall apply to the Game, Fish and Oyster Commissioner or his deputy, for a permit to use such seine, net or other contrivance for catching shrimp, and such Commissioner or his deputy shall fix and establish the mesh, construction, depth and length of such seine or net or other contrivance so that it shall not be used for other purposes than in taking shrimp, and he shall tag seine officially and issue such permit, he shall state in what waters and localities such

seines or nets shall be used. And any person using such shrimp seine or other contrivance or net in any waters or locality other than that stated in such permit, shall be guilty of a misdemeanor and on conviction shall be fined in a sum of not less than twenty-five nor more than two hundred dollars, and such nets and seines or contrivances thus used in violation of this article shall be and is hereby declared a nuisance, and the Game, Fish and Oyster Commissioner or his deputy shall abate and destroy the same and no suit shall be maintained in the Courts for such abatement and destruction.

Article 44. Any person offering for sale, or who shall sell, any cargo of oysters which shall contain more than five per cent young oysters, shall be deemed guilty of a misdemeanor and upon conviction, shall be fined not less than ten dollars, nor more than two hundred dollars. Any oyster that measures less than three one one-half inches from hinge to mouth shall be deemed a young oyster for the purpose of this and the preceding article. The Game, Fish and Oyster Commissioner is authorized to permit the taking of oysters from any reef he may designate of less size than three and one-half inches, but it shall be unlawful to take oysters from reefs other than those designated by such commissioner, and anyone taking such oysters smaller in measure than three and one-half inches from hinge to mouth from other than such reefs as designated by such commissioner, shall be deemed guilty of a misdemeanor and upon conviction shall be fined in a sum of not less than twenty-five nor more than two hundred dollars.

Article 45. It shall be unlawful for any person to take or catch oysters from any public beds or reefs for sale or for market from the first day of April to the first day of September of each year. Any person offending against this article shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than ten dollars nor more than two hundred dollars, and each day shall constitute a separate offense; provided, that part of the Laguna Madre, south and west of Paffin's Bay be excepted and exempted from this article.

Article 46. It shall be unlawful for any person gathering oysters for planting or depositing for preparations for market, on locations obtained from the State or on private property, to sell, market or in any way dispose of oysters so gathered at the time of gathering, for any other purpose than planting, or preparing for market, provided this shall not be considered as meaning the right to dispose of a location or oyster bed. Any person offending against this article shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined in any sum not less than fifty nor more than two hundred dollars.

Article 47. It shall be unlawful for any person, firm, corporation, or joint stock company to gather seed oysters for planting without having first obtained a permit or license to do so from the Game, Fish and Oyster Commissioner, or his deputy, said permit or license to designate the reef or beds from which the applicant is allowed to gather seed oysters, or oysters to be prepared for market as provided in Article 25 of this Act, and any person, agent, employee or officer of a firm, corporation or joint stock company gathering or having gathered oysters for planting or oysters to be prepared for market shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than fifty dollars, nor more than two hundred dollars.

Article 48. If any person shall refuse to pay any tax provided in this Act on any fish, oysters, shrimp, turtle, terrapin, clams, crabs or other marine life, which he has sold, he shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined in a sum of not less than ten nor more than one hundred dollars.

Article 49. Whenever the Game, Fish and Oyster Commissioner believes that any public reef is being overworked or damaged in any way, or where such reef has been worked under his supervision, he may close such reef against anyone taking oysters from it, but before he closes such reef he shall give two weeks' notice of such closing by posting notices in such fish houses as are in two towns nearest such reefs. In such notices he shall state the date of closing and the time for which such reefs shall be closed, and any person taking oysters from

such reefs within the time closed by such Commissioner, he shall be deemed guilty of a misdemeanor, and on conviction shall be fined in a sum of not less than twenty-five nor more than two hundred dollars.

Article 50. Whenever the Game, Fish and Oyster Commissioner believes that an oyster bed can be improved by the use of dredges he may grant the use of such dredges on such reefs, but only under the superintendence, supervision and in the presence of a deputy fish and oyster commissioner. And the Game, Fish and Oyster Commissioner is authorized to purchase boats and implements and employ labor to work such public oyster reefs and beds as he thinks can be improved thereby, the expense of which shall be paid from the Fish and Oyster Fund of the State on warrants issued by the Comptroller or the sworn statement as to the correctness of such expense by the Game, Fish and Oyster Commissioner.

Article 51. Complaints against any person for the violation of the game, fish and oyster law of this State may be made before any justice of the peace of the County in which the offense is charged to have been committed, and he shall have jurisdiction to try and dispose of the case; provided the penalties prescribed for such offenses are within the jurisdiction of justices of the peace.

Article 52. Any court, office or tribunal having jurisdiction of the offense set forth in this chapter, or any district or county attorney may subpoena persons and compel their attendance as witnessses to testify as to violations of any of the provisions of this law; and any person so summoned and examined shall not be liable to prosecution for any of the violations of this law about which he may testify; and a conviction of said offense may be had upon the unsupported evidence of an accomplice or participant.

Article 53. It shall be unlawful for any person to sell or offer for sale or to have in his possession for sale, or to have in any mercantile business, establishment, or in any market where merchandise is disposed of any red fish or channel bass of greater length than twenty-seven inches or less than fourteen inches; any salt water or speckled sea trout of less than twelve inches; any sheep

head of less than nine inches in length; any flounder of less than twelve inches in length; any pompano of less than nine inches in length; any mackeral of less than thirteen inches in length; any Spanish mackerel of less than fourteen inches in length; and any person violating any of the provisions of the above part of this Article shall be deemed guilty of a misdemeanor and on conviction shall be fined in a sum of not less than ten dollars nor more than fifty dollars. The place of sale or offering for sale shall for the purposes of this act to establish venue be either the place from which such fish are shipped or where the fish are found or offered for sale; and it shall be unlawful in selling or offering for sale any fish mentioned in this Act, to sever the head from the body, except the gaff-topsail and June fish, and all fish marketed or sold must be weighed and sold with the head attached, except the gaff-topsail and June fish, and any person selling any fish hereinbefore mentioned except the gaff-topsail and June fish without its head being attached to the body shall be deemed guilty of a misdemeanor and on conviction shall be fined in a sum of not less than twenty-five dollars and no more than one hundred dollars.

Article 54. All United States Coastal Survey Charts covering the coast of Texas shall be admissible as evidence in all prosecutions under this Act.

Article 55. It shall be unlawful for any person to take or kill or have in his possession at any time within five years from the passage of this Act any sea turtle, known as the Green Turtle, and it shall be unlawful to destroy or take the eggs of such turtle and any person who shall take, kill or have in his possession within such five years, or who shall destroy or take the eggs of such turtle shall be deemed guilty of a misdemeanor and upon conviction shall be fined in a sum of not less than fifty nor more than one hundred dollars.

Article 56. It shall be unlawful for any person to take, kill or have in his possession any salt water terrapin except during the months of November, December, January and February, and any person killing or taking or having in his possession any salt water terrapin at any time except during the months of November, December,

January and February, shall be guilty of a misdemeanor, and on conviction shall be fined in a sum of not less than fifty nor more than one hundred dollars.

Article 57. It shall be unlawful to enter or trespass on any State fish hatchery or reservation set apart for the propagation or keeping of birds, fowls and animals of the State, and any person so entering and trespassing on the grounds of such hatcheries or on the grounds set apart by the State for the propagation and keeping of birds and animals, without the permission of the Game, Fish and Oyster Commissioner, or Deputy Game, Fish and Oyster Commissioner in charge of such reservation, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in the sum of not less than ten nor more than twenty-five dollars, and such trespasser as mentioned may be summarily ejected from such hatcheries, or grounds. Any person who shall take, injure or kill any fish kept by the State in its hatcheries, or any bird or animal kept by the State on its reservation grounds or elsewhere for propagation or exhibition purposes shall be guilty of a misdemeanor, and on conviction shall be fined in a sum of not less than fifty nor more than two hundred dollars.

It shall be unlawful to bring into or keep on any fish hatchery or reservation for the propagation or exhibition of any birds, fowls or animal, any cat, dog, or other animal calculated to kill or injure any fish, bird or animal and any cat, dog, or other predacious animal found on the grounds of such hatcheries or reservations as mentioned, is hereby declared to have become nuisances by their presence on the grounds of such hatcheries and reservations as mentioned, and the Game, Fish and Oyster Commissioner or his Deputy in charge as aforesaid shall hate and destroy them as nuisance, and no suit for damages shall be maintained against such officials therefor.

Article 58. It shall be unlawful for any person, firm or corporation to ship, sell or have in his possession for the purpose of sale any oysters or other fish taken from insanitary or polluted oyster reefs or beds. For the purpose of this Act, any reef or bed of oysters which have been declared by the Food and Drug Commissioner of this State as insanitary or polluted, shall be within the

meaning of this Act insanitary and polluted. Any person or firm or corporation, who or which shall sell or have in his possession for the purpose of sale, oysters from such insanitary and polluted reefs shall be deemed guilty of a misdemeanor, and on conviction shall be fined in a sum of not less than twenty five and not more than two hundred dollars.

Article 59. Any container or receptacle for oysters which has not been thoroughly cleaned before oysters are placed in it, is hereby declared to be insanitary, and any such persons selling oysters from such receptacle or shipping oysters in such receptacle, shall be deemed guilty of a misdemeanor, and on conviction shall be fined in a sum of not less than twenty-five nor more than one hundred dollars. It shall be unlawful for any person, firm or corporation to ship into or in this State, sell or have in his possession for the purpose of sale, any oyster or other shell fish in which any formaldehyde or other preservative has been placed, or any oysters or other shell fish which have been subjected to 'floating,' 'drinking,' or 'bloating' in water containing less salt than in which they are grown, or oysters or other shell fish to which water has been added either directly or indirectly or in the form of melted ice. Provided that the unpolluted salt, cold or ice water may be used in washing shucked or shelled oysters or other shell fish, if the washing does not continue any longer than the minimum time necessary for chilling and any person who engages in 'floating,' 'drinking,' or 'bloating' oysters in this State, or who ships into or in this State such oysters or who has in his possession, sells or offers to sell any such oyster is guilty of a misdemeanor, and on conviction shall be fined in the sum of not less than twenty and no more than two hundred dollars.

Article 60. It shall be unlawful for any person to set or drag in any of the public waters of this State, any net or seines made of wire or other metallic substance and any one so setting or dragging any net or seines made of wire or other metallic material, shall be declared guilty of a misdemeanor, and on conviction shall be fined in a sum of not less than fifty and no more than one hun-

dred dollars. And the Game, Fish and Oyster Commissioner shall destroy such nets and seines as nuisances where found.

It shall be unlawful for any person to take or catch fish in the public fresh water rivers, creeks, lakes, bayous, pools, lagoons or tanks of this State, by any other means than by the ordinary hook and line or trout line, or by a set or drag net or seine, the meshes of which are three inches square or trammel net, the meshes of any part of which are less than three inches square, or by a minnow seine of more than twenty feet in length, and it shall be unlawful for any person to place in the public fresh water rivers, creeks, lakes, bayous, pools, lagoons or tanks of this State any net or other device or trap for taking or catching fish other than a set or drag net or seine the meshes of which are less than four inches square. Any person violating any provision of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined any sum not less than twenty-five nor more than one hundred dollars.

Provided that the Game, Fish and Oyster Commissioner is authorized to close any of the waters mentioned in this Section against the use of nets or seines or any particular kind of such nets and seines whenever he thinks that such closing is necessary or best to protect and conserve the fish in such waters. But before closing such waters against the use of seines or nets or any particular kind of seine or net, he shall give notice by posting his intentions for two weeks, at not less than three stores or other places in proximity to such waters.

Any person who shall fish with a net or seine in such closed waters or who shall use such particular kind of net or seine, as forbidden in such waters, after the notice given as above required, shall be deemed guilty of a misdemeanor, and on conviction shall be fined in a sum of not less than twenty-five and no more than one hundred dollars.

Article 61. All fresh water rivers and streams in this State and all lakes, lagoons and bodies of rivers, except tidal bays or coastal waters, such as bays, and gulfs, shall be and are hereby declared to be fresh water streams and rivers to their mouths, for the purpose of this Act, and it

shall be unlawful to set nets or drag seines or fish in any other ways in such streams, rivers and their connecting lakes, lagoons and bodies of water mentioned, except in conformity with the laws herein enacted to govern, apply and control in fresh water fishing.

Article 62. Any person dragging a seine or engaging in taking fish in a set net shall return to the water all fish under and above size, according to the measure or weight herein established, and all other fish, except sharks, gars, rays, turtle and terrapin, saw fish and cat fish, except the gaff-topsail cat, which may be retained, and any person not returning such fish to the water as required by this article shall be deemed guilty of a misdemeanor, and on conviction shall be fined in a sum of not less than fifty and no more than one hundred dollars.

Article 63. Whenever a net described or mentioned in this law as a trammel, strike, gill, hoop, pound, purse or other kind of a net, the standard net of such variety or kind or the usual or ordinary kind of such net as manufactured and sold as in or to the trade is meant. No strike or gill net shall be licensed or permitted in the tidal, coastal or fresh waters of this State with a lead line over three-sixteenths of an inch in diameter. And any person using or having in his possession any gill or strike net which has on it a lead line of more than three-sixteenths of an inch in diameter, shall be deemed guilty of a misdemeanor, and on conviction shall be fined not less than twenty-five and no more than one hundred dollars.

Article 64. It shall be unlawful for any person to catch any fish in the public fresh waters of this State with any seine or net other than a minnow seine, not exceeding twenty feet in length, or to drag any seine except such specified minnow seine, or to set any net in the public fresh waters of this State during the months of March and April, or to fish with any artificial bait or line of any kind in the fresh public waters of this State during the months of March and April. And any person who shall catch any fish with a seine or net in the public waters of this State or who shall drag or set any net for the purpose of catching fish in the fresh public waters

of this State, or shall use an artificial bait or line in fishing in such public fresh waters in this State during the months of March and April, shall be deemed guilty of a misdemeanor, and on conviction shall be fined in a sum of not less than twenty-five dollars and not more than one hundred dollars. Provided that where a city, town or other municipality owns any reservoir, lake or other pool of water, it shall exercise all control over it in regard to the taking of fish from it and this Article shall not apply to such waters as mentioned.

Article 65. Any person who shall take or catch from the public waters of this State or have in his possession any bass of less length than eleven inches or any white perch or crappie of less length than seven inches, shall be deemed guilty of a misdemeanor, and on conviction shall be fined in a sum of not less than ten nor more than one hundred dollars.

Article 66. In all prosecutions for the sale of fish of unlawful size, the place of such sale is hereby established for the purpose of venue to be either at the place of such shipment or at the place of the receipt of such shipment, or in any County through which such shipment may pass at the discretion of the State.

Article 67. Out of the Fish and Oyster Fund all deputy fish and oyster commissioners shall be paid their salaries and expenses monthly on the approval of the Game, Fish and Oyster Commissioner; the Comptroller drawing his warrant in favor of each of said persons on said special fish and oyster fund as follows: Chief Deputy, fifty dollars per month; deputies on boats, one hundred dollars per month; mates on boats, seventy-five dollars per month; shore or interior deputies, sixty dollars per month; First Deputy at Caddo Lake, one hundred dollars; Deputy at Medina Lake, one hundred dollars per month; Deputy at Galveston, one hundred dollars per month; shore deputy at Houston, one hundred and thirty-five dollars a month; Deputy at Fish Hatchery, one hundred and twenty-five dollars per month. Three workmen at the hatchery at sixty dollars each, per month. It shall be the duty of the Game, Fish and Oyster Commissioner to collect all taxes, licenses and fines as imposed by law, and to enforce their

payment, to inspect all products so taxed, and to verify the weights and measures thereof, to collect all license fees, to collect all rents or locations for planting oysters, to examine, or have examined, all streams, lakes, or ponds, when requested so to do, for the purpose of stocking such waters with fish, best suited to such locations, and he shall superintend and have control in the propagation of fish in the State Fish Hatchery and the distribution of such fish, and he shall have superintendence and control of the propagation and distribution of birds and game in the State reservations over which he may have control, or which may be established for such propagation. He shall also be allowed a sum not to exceed fifteen hundred dollars per annum for office rent, traveling and other expenses, to be paid on vouchers approved by the Governor, showing that such amounts have actually been expended in the performance of his duties of said office, and he shall be alowed all stationery, books, blanks, tags, State laws and charts necessary to the execution of the duties of his office.

Article 68. The Game, Fish, and Oyster Commissioner shall make on the 31st day of August of each year, or as soon thereafter as practicable, not later than October 1st, of each year, a report to the Governor, showing the conditions of the fish and oyster industry. The report shall show the special tax collected, the number and class of all boats engaged in the fish and oyster trade, the number of licenses issued and license fees collected, the number, place and acreage of private oyster beds and rents received therefor, and all other amounts collected from whatever source, and the disbursements therefor, as provided for in this chapter with such observations and remarks as pertain to the industry. The report shall also contain a statement of all stock furnished, the cost of same, the streams, lakes or ponds stocked, the number and kind of fish used in each, and the condition of such plants, with any other data he may obtain on the subjects. The Governor shall order a sufficient number of copies of such report to be printed and filed in the Secretary of State's Office for the purpose of free distribution to parties interested therein. Failure to make such report within the

time specified, the said Commissioner may, in the discretion of the Governor, be dismissed from his office.

Article 70. The Commissioner shall be responsible, on his bond, for the official acts of his deputies.

Article 71. The Game, Fish and Oyster Commissioner shall keep a record book, which shall be well bound, and in which shall be recorded all special taxes collected, all licenses issued and license fees collected, all certificates issued for locations of private oyster beds, showing the date of certificate and application, when and how the applications were executed and the manner in which the bottoms were examined, and rents collected for such locations, showing also all stock fish furnished, to whom furnished, and the cost of same, the streams, lakes or ponds stocked, number and kinds of fish used in each and showing all collections and disbursements in and from his office.

The Game, Fish and Oyster Commissioner is authorized to appoint deputies for each of the vessels owned by the State and employed in the Fish and Oyster Department. Such boat deputies shall have and exercise the same powers and duties as the Game, Fish and Oyster Commissioner and execute a good and sufficient bond, with two or more sureties, that such deputies shall at all times be subject to the orders of the Game, Fish and Oyster Commissioner.

The Game, Fish and Oyster Commissioner is authorized to appoint such other shore and interior deputies as he may deem necessary for the enforcement of the law. And such shore deputies and interior deputies shall have and exercise the same powers and duties as the Game, Fish and Oyster Commissioner in the enforcement of the Game, Fish and Oyster Laws, and be at all times subject to his order.

No person shall hold the office of deputy fish and oyster commissioner who is not a citizen of the United States and of the State of Texas. All deputies shall hold their office at the pleasure of the Game, Fish and Oyster Commissioner.

Article 72. Before entering upon the duties of his office each deputy fish and oyster commissioner shall file

with the Fish and Oyster Commissioner a good and sufficient bond, with two or more sureties, in the sum of one thousand dollars, and take the same oath of office as the Game, Fish and Oyster Commissioner, and said bond and oath shall be governed by the provisions of Article 4.

Article 73. Each Deputy Fish and Oyster Commissioner shall be ex officio game commissioner and shall exercise the duties and powers of Game Commissioner under the direction of the Game, Fish and Oyster Commissioner.

Article 74. All Deputy Fish and Oyster Commissioners shall make a monthly report to the Game, Fish and Oyster Commissioner of all funds collected by them, remitting along with said report all sums of money collected by them during the said month.

Article 75. It shall be unlawful for any person, firm or corporation to take from the public waters of this State for sale, any mussels, clams, or naiad or shells thereof without first obtaining a license from the Game, Fish and Oyster Commissioner; said license shall be in such form as may be determined by the said Commissioner but shall state the waters in which the licensee may operate. The applicant shall pay to the said Commissioner, as a license fee, the sum of ten dollars and in addition thereto the sum of twenty five dollars for permission to use a dredge. Said license shall expire one year from the date of issuance. Any person violating any of the provisions of this Article shall, upon conviction, be fined not less than ten dollars nor more than one hundred dollars.

Article 76. It shall be unlawful for the Game, Fish and Oyster Commissioner of the State and his deputies or the United States Commissioner of Fisheries and his duly authorized Agents, to take at any time in any manner from the public fresh waters of this State all brood fish required by them in operation of the State and Federal Hatcheries.

Article 76 a. If any section of this bill shall be held unconstitutional it shall not affect any other section of this bill, and all sections save the one that may be de-

clared unconstitutional shall continue to be in full force and effect.

Article 77. This Act shall be construed to be a continuation of all former Acts upon the subject, and any and all suits instituted under any former Act shall not abate, but prosecutions thereof shall continue under the provisions of such former Acts or under this Act.

Article 78. The fact that the present laws upon the subject are insufficient to adequately protect the subject matter of this bill and the further fact that the near approach of the end of the present session of the Legislature create an emergency and an imperative public necessity that the Constitutional rule requiring bills to be read on three several days be and the same is hereby suspended and that this Act take effect and be in force from and after its passage, and it is so enacted.

(Note—S. B. No. 10 passed the Senate on July 16, 1919, by a vote of 27 yeas and 0 nays; and passed the House of Representative on July 21, 1919, without a record vote.)

Approved July 30, 1919.

Becomes effective 90 days after adjournment.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 178

GULF FISHERIES CO., APPELLANT,

vs.

JOHN L. DARROUZET, DISTRICT AND COUNTY ATTORNEY OF GALVESTON COUNTY, TEXAS; D. B. MACINERNEY, SUBSTITUTED BY AGREEMENT, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

REPLY BRIEF FOR GULF FISHERIES COMPANY, APPELLANT.

Additional Argument on Point I.

Fish Handled by Appellants are Imports.

We feel that a short reply to brief of respondent will be of assistance to the Court in eliminating what

by

we take to be mistakes of fact, contained in the brief of respondent and in analyzing some of the cases cited.

Respondent claims that the fish are not brought in from foreign countries and seeks to make it appear that the fish are caught in "open sea or waters adjacent to foreign countries." In the "Agreed Statement of Facts" it is prescribed, page 10: "Some of said fish being caught at open sea, but most of the fish being caught in foreign waters." Respondent cites cases on page 5 *et seq.* of his brief to show that a State owns fish in its territorial waters. Does it not follow, then, that a foreign country owns fish in its waters, and that fish caught in such foreign waters are brought in from foreign States? Even then, under the narrowest possible definition of imports, as things brought into a country from a foreign country, the majority of fish would be imports.

Respondent cites many cases in his brief, pages 5 to 8, holding that a State can regulate taking of fish and game within its borders, all based on the theory that the State has a property right in the game and the taking is subject to regulation by the State, who is the real owner. But the red snappers, the fish in the case at bar, are admittedly from foreign waters, and therefore the property of a foreign country. None of the cases cited recognizes the right of the State of Texas to exercise control over fish in foreign waters imported into the United States and destined to other States. Texas has no property rights in such fish to protect, and certainly a tax on such imported fish is not justified by the decisions cited in Point I.

In the case *Silz vs. Hesterberg*, 211 U. S., 31; 53 L. Ed., 75, the Supreme Court held that a State law was valid which made it unlawful to have in one's possession in New York imported game of the species prohibited by law in New York; but this was on the theory that it was necessary to protect the game of New York in this manner. The law in Texas is not passed for this purpose in the case at bar for two reasons: first, red snappers are not Texas fish; second, the Texas law does not prohibit the selling of red snappers without inspection, but permits anyone who is a citizen of the United States to sell red snappers upon the payment of a certain fee. The two cases are not in point. The Court said:

> "It has been provided that possession of certain kinds of game during the closed season shall be prohibited owing to the possibilities that dealers in game may sell birds of the domestic kind under the claim that they were taken in another State or country."

There is certainly no such state of facts in the case at bar or any such reason for holding the Texas fish tax law valid. Then, in addition, there is a difference between making it unlawful to possess imported fish and in passing a law taxing imported fish. There is a Federal constitutional provision limiting the right to tax the imported fish provided. Article 1, Section 10, Clause 2: "No State shall, without the consent of Congress, lay any impost or duties on imports or exports except what may be absolutely necessary for the execu-

tion of its inspection laws." Clearly, the State, to tax the fish in question, must show the law to be an inspection law.

Respondent argues that because there is no import duty on fish they are not imports. On the contrary, the very fact that the fish are placed on the free list in the Tariff Act shows that they are considered imports by Congress. The Tariff Act of 1922, paragraphs 16 and 30, placed the following on the free list: "Oils, animal and spermaceti, whale and other fish oils of American fisheries, and all fish and other products of such fisheries and all cod and cod liver oil." The United States customs regulations for 1923, Article 449, in defining American fisheries, says:

> "Fish or other marine products taken in American waters or on the high seas by an American vessel and brought into the port by the vessel taking same are not imported from a foreign port and no entry thereof is required."

This, however, you will note, only covers open waters and American waters. The regulation continues in defining American fisheries:

> "American fisheries within the meaning of said paragraph is defined as a fishery operating under the American flag by American vessels in foreign waters, in which such vessel shall have the right, by treaty or otherwise, to take fish and other marine products."

Then the regulation goes on:

> "That the purchase by the owner, agent, master or crew of an American vessel of fish or other marine products taken by the citizens of another country in foreign waters will subject such fish or other marine products to be treated as foreign merchandise,"

clearly recognizing that fish caught in foreign waters are exempt if caught by American fisheries, due to the exemption in the Tariff Act; but if caught by others in foreign waters and purchased by American fisheries, they will be subject to the Tariff Act.

We still insist, however, that the definition of imports given in *Brown vs. Maryland* is correct: "They are articles themselves which are brought into the country. * * * Webster defines imports as merchandise imported or brought into a country from without or beyond its boundaries." Clearly, the fish are imports.

Additional Argument on Point II.

The fish have not become so mingled with the common mass of property in the State as to lose their character as imports, and therefore their exemption from State taxation.

Respondent contends that the fish are processed. This is not in accordance with the Agreed Statement of Facts (Transcript, page 11):

> "Said fish are not cooked or treated in any manner, but are shipped to the purchaser in the

> same condition as when caught, except that said fish are washed, entrails removed as above stated, and then such fish with fresh ice are placed loose in barrels and so shipped,"

and the transcript shows that from 15 per cent to 18 per cent are untouched. There is certainly no separation or division of the fish for the purpose of sale, but rather a grouping of many fish for the purpose of sale. They are shipped from Galveston the same day received, in orders from 50 pounds up, the average order being 400 pounds. Can it be said that there is a breaking of the original packages for the purpose of sale? There is certainly no mixing of the fish with the common mass of property in the State so as to subject it to taxation.

Respondent for the first time contends that the Gulf Fisheries Company is not the importer, but that the Gulf Fisheries Company turns over its equipment and boats to some fishermen, and that the fishermen are the original importers. This is not in accordance with the Agreed Statement of Facts, which reads, Transcript, page 10:

> "Said fish are caught and obtained by plaintiff in the following manner, to wit: Plaintiff employs fishermen to operate said vessels and catch said fish."

Then the Statement of Facts goes on to outline the wages paid fishermen, based on the amount of fish caught, and provides (Transcript, page 11):

> "Plaintiff brings said fish on its vessels to the Port of Galveston,"

and respondent in its answer admits that the fish are brought into Galveston by plaintiff (Transcript, page 7):

> "That all fish obtained by plaintiff for the purpose of sale are from foreign waters; that said fish are composed largely of red snappers, but defendant avers that after said fish are caught in said waters they are brought into the City of Galveston, Galveston County, Texas, by plaintiff on vessels belonging to plaintiff and removed to plaintiff's place of business situated in the City of Galveston, Galveston County, Texas."

So the fish are clearly brought in by plaintiff and are imports. The trial court found as a fact that the fish were brought in by plaintiff. Under the Agreed Statement of Facts the fishermen do not have title to the fish, but to a certain percentage of the proceeds after the fish are sold and after certain deductions are made. This question, however, is clearly settled by the Agreed Statement of Facts.

The fish are clearly moving in commerce at all times and have not been mixed with the common mass of the property of the State. This is the true test as to when the fish become subject to taxation. As was said in *Brown vs. Maryland*, 12 Wheaton, 419, 441; 6 L. Ed., 678:

> "It is sufficient for the present to say generally that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property

> in the country it has, perhaps, lost its distinctiv
> character as an import and has become subjec
> to the taxing power of the State."

He then goes on to apply the law to the facts in th
Brown case and says:

> "But while remaining the property of the im
> porter in his warehouse in the original form an
> package in which it was imported, a tax on it i
> too plainly a duty on imports to escape the pro
> hibition in the Constitution."

The rule we submit is: Has the importer "so acte
upon the thing imported that it has become incor
porated and mixed up with the mass of property i
the country?" This we think was recognized to be th
law by Mr. Chief Justice Taney (who represented
Maryland in the case of *Brown vs. Maryland*) when he
says in the license cases, 5 Howard, 504; 12 L. Ed., 256

> "Indeed, goods imported, while they remain
> in the hands of the importer in the form and
> shape in which they were brought into the coun
> try, can in no just sense be regarded as a part
> of the mass of the property in the State usually
> taxed for the support of the State government."

He continues:

> "A great, perhaps the greatest, part imported
> in some of the States is not owned or brought in
> by citizens of the State, but by citizens of other
> States or foreigners, and while they are in the
> hands of the importer for sale in the form and

> shape in which they are introduced and in which they are intended to be sold, *they may be regarded as merely in transit on their way to distant cities, villages and countries for which they are destined* and where they are expected to be used and consumed and for the supply of which they were imported, and a tax upon them, while in this condition, for State purposes, whether by direct assessment or indirectly by requiring a license to sell, would be hardly more justifiable in principle than in terms of duty upon merchandise in passing through a State."

In the case at bar the fish are actually in transit when taxed (Transcript, page 12):

> "That none of said fish are stored in cold-storage plants in the city, but are shipped out of Galveston as fast as the fish can be re-iced, washed and handled, as above stated, and loaded in express cars, and practically all of said fish are shipped the day the fish are unloaded from the boats on which they are brought to Galveston."

We submit that there has been no acting upon the thing imported, so that it has become incorporated and mixed up with the mass of property in the country, and that there has been no breaking of the original package and dividing same for the purpose of sale. In fact, we think that the original package theory has no application in a thing that is not put up in packages.

Additional Argument on Point III.

The wholesale fish dealers' tax of Texas is a license tax for the privilege of engaging in the business of wholesale fish dealers, and therefore void as a tax on imports.

To make the tax an inspection tax, as respondent contends that it is, it is necessary to consider the act as a whole. Does the act provide for an inspection of the fish? Does it appoint inspectors? Does it provide that the money raised from the tax shall be used only for inspection purposes? Does it set up standards that all fish must meet? If so, it is an inspection tax. All of the cases cited by respondent holding taxes valid as inspection taxes do these things. It is amusing to see how few elements of a license tax the Texas law has, as set forth by respondent in his brief on pages 24 and 25. All that the law provides is that in the application for the license the applicant must agree that all products handled by him shall at all times be subject to inspection, and that applicant will keep a record of all fish and oysters. This keeping of the record costs the State of Texas nothing. So why the tax? There is no provision for inspection and there is no standard that the fish must meet. True, Article 965 makes it unlawful to sell, ship or possess fish or oysters taken from insanitary or polluted reefs or beds. Article 972 prohibits the dealer from placing oysters in any insanitary receptacle, and Article 973 prohibits the dealer from possessing for sale or selling oysters or shellfish

in which preservatives have been placed. But none of these applies to the fish imported from foreign waters and have no application to fish, with the exception of the fish from polluted beds. Our contention is that the wholesale fish dealers' license is not an inspection law.

In the case of *Askren vs. Continental Oil Company et al.*, 252 U. S., 444; 64 L. Ed., 654, the Supreme Court had a case before it brought by three oil companies to enjoin the enforcement of an act of the legislature of New Mexico. The act provided:

> "An act providing for an excise tax upon the sale or use of gasoline and for a license tax to be paid by distributors and retail dealers therein; providing for collection and application of such taxes; providing for inspection of gasoline, and making it unlawful to sell below a certain grade without notifying purchaser thereof."

The case came before a three-judge court on temporary injunction. The lower court enjoined the enforcement of the statute. The act provided an annual license tax of $50 for each distributing station and the retail dealer was required to pay a license tax of $5 and, in addition, a tax of 2 cents per gallon on all gasoline sold. Inspectors were provided for each of the eight judicial districts of the State, who are required to see that the provisions of the act are enforced and privileged to examine the books and accounts of distributors and retail dealers or warehousemen or others receiving and storing gasoline. Their salaries are provided and the salaries and expense bills are to be paid out of the State road fund. The State treasurer is required to set aside

from license fees and taxes collected a sufficient sum to pay the salaries and traveling expenses of the inspectors out of the money received from such collections. The balance is to the credit of the State road fund, to be used for construction, improvement, and maintenance of the public highway. Mr. Justice Day said, page 447:

> "It is evident from the provisions of the act thus stated that it is not an inspection act merely. Indeed, the inspectors do not seem to be required to make any inspection beyond seeing that the provisions of the act are enforced and the excess of the salaries and the fees of the inspectors is to be used in making roads in the State. Considering its provisions and the effect of the act, it is a tax upon the price of dealing in gasoline in the State of New Mexico."

The Court continues, page 449:

> "As to gasoline brought into the State in tank cars or in the original packages and so sold, we are unable to discover any difference in plan of importation and sale between the instant case and that before us in *Standard Oil Co. vs. Graves*, 249 U. S., 289; 63 L. Ed., 602; 39 Supreme Court Reporter, 320, in which we held that a tax which was in effect a privilege tax, as is the one under consideration providing for a levy of fees in excess of the cost of inspection, amounted to a direct burden on interstate commerce. In that case we reaffirmed what has often been adjudicated heretofore in this Court, that the direct and necessary effect of such legis-

> lation was to impose a burden upon interstate commerce; that under the Federal Constitution the importer of such products from another State into his own State for sale in the original packages had a right to sell the same in such packages without being taxed for the privilege by taxation of the sort here involved. Upon this branch of the case we deem it only necessary to refer to that case and the cases therein cited as establishing the proposition that the license tax upon the sale of gasoline brought into the State in tank cars or in original packages and thus sold is beyond the taxing power of the State."

It was held that the district court did not err in granting the injunction.

In view of statements in respondent's brief, we want to make it clear that we have raised the point that the Texas law is void, both because of the $10 license tax provision and because of the tax of $1 on each 1,000 pounds of fish handled. Our assignment of error is broad enough and specifically covers both points.

Respondent recites the case of *Patapsco Guano Co. vs. North Carolina*, 171 U. S., 345; 43 L. Ed., 191; 18 Supreme Court, 862. A careful examination of that case, we think, will show that it is an authority for our contention that the Texas law is not an inspection law. The North Carolina law as originally enacted was declared void. See in *American Fertilizer Co. vs. North Carolina Board of Agriculture*, 43 Fed., 609. This law required a payment of $500 for the privilege of selling certain types of fertilizer and charged an inspection tax of 25 cents per ton on commercial fertilizers. Sec-

tion 9 of the law required fertilizers offered for sale to be labeled and stamped, showing the name, chemical composition, contents, and the real percentages of certain ingredients. Section 10 empowered the Board to collect samples for analysis. Section 12 required the employment of a chemist to make analyses. The Federal circuit court held that the law was void, holding that the tax was a tax on imports, quoting Brown *vs.* Maryland. The circuit court said:

> "Defendants contend that this taxation can be sustained as part of the police power, they attempting, what is perhaps impossible, to accurately define what does and what does not come under the control of police power. It is evident that the taxation in question does not come under the ordinary use of the phrase * * *. If the legislation in question can properly be referred to that power, it will be because of the right to pass inspection laws and may be deemed to have its foundation in the police power of the State. Certainly, if it be an attempt at what the act seems to contemplate, a tax on an occupation or a privilege tax, it is because it is used to secure an inspection of commercial fertilizers before they can be sold in North Carolina. Such a tax would be constitutional only within the limits of the Constitution. It cannot be sustained when it is evidently in excess of what is required for such purposes and when the proceeds are applied to other purposes."

In the case at bar the money received is not applied to cost of inspection. As is shown by respondent's brief, he says:

"The purposes for which the funds raised are used are set forth in Article 4030 of Revised Civil Statutes, which reads as follows: 'Article 4030: All funds collected by the Game, Fish and Oyster Commission from the sale of commercial fishermen's licenses, fish dealers' licenses, taxes on fish, crabs, oysters, and shrimps and all other taxed marine life and all fines and penalties collected for any infraction of any law relating to the commercial fishermen shall be placed in the State treasury to the credit of a fund to be known as the Fish and Oyster Fund and together with money now to the credit of this fund is hereby appropriated and shall be used by the Game, Fish and Oyster Commission in the enforcement of the fish and oyster laws of this State and in the disseminating of useful information pertaining to the economic value of fish and oyster and marine life, the making of scientific investigations and the survey of the principal seafood fishes and marine life for the purpose of the better protection and conservation of same, with propagation and distribution of seafood fishes, oysters, and other marine life, the purchase, repair and operation of boats and the employment of deputies to carry out and enforce the provisions of this act."

Certainly it does not provide that the money is to be spent to carry out inspection of the fish and the law itself does not provide for any inspection; but the method of expenditure shows that the money is to be spent for the protection of the fish and oyster industry of Texas.

The State of North Carolina passed a new law and this was the one under consideration in the case of ***Patapsco Guano Co. vs. North Carolina***, *supra*. The new law did not require $500 for license or privilege to do business. It levied a tax of 25 cents per ton, required fertilizer to be analyzed, tagged, and inspected, going into detail with regard to the inspection. It was the new law that was held valid as an inspection law. The court at great length discusses a provision for the $500 of the money raised to be used in an oyster survey and finally holds that this section of the old law was not contained in the new law, saying, page 354:

> "It is impossible to impute to the general assembly the intention of repealing parts of the code which had been declared unconstitutional and revive earlier laws which might render the amended law liable to the same objection,"

thus recognizing that the using of the funds for other purposes than inspection made the law void. The case of *Red Seal Oil Co. vs. Federal Board of Agriculture*, 172 Fed., 695, stated by the lower court, is not in point with the Texas law. The law in question there was clearly an inspection law and provided that all kerosene for sale should be subject to inspection, required the Commissioner of Agriculture to make rules and regulations for inspection, required the Board to appoint oil inspectors, set a price of ½ cent per gallon to pay the expenses of inspection, and required money to be paid into an inspection fund.

The case of *Turner vs. Maryland*, 107 U. S., 38; 27 L. Ed., 370, provided for detailed inspection; weighing of the tobacco; marking same; required drawing of samples from each hogshead of tobacco; required that unmerchantable tobacco be reconditioned, reweighed, and reinspected. This case considers what are the elements of an inspection law, and says, page 43:

> "Recognized elements of inspection laws have always been quality of the article, form, capacity, size, weight of package, method of putting up, and marking and branding of various kinds, all of these matters being supervised by a public officer having authority to pass or not pass the article as lawful merchandise as it did or did not answer the prescribed requirements,"

and that is exactly what the Texas law does not do. There are no prescribed requirements. What would the inspector look for? Every inspection law must set out a certain rule or requirement that the article must conform to. Then the requirement is measured on that standard and the cost of this measuring or inspecting is a valid charge, but the Texas Wholesale Fish Dealers' Law is not an inspection law as the term is used in Turner *vs.* Maryland.

Foote Co. vs. Stanley, 232 U. S., 494; 58 L. Ed., 698, a case in which there was a charge of one cent per bushel on oysters coming from other States, was made to help defray expenses of inspection and for other expenses of the State Fishery force, was held void in violation of Article 1, Section 8, as an unlawful interference with interstate commerce where the tax was

larger than the amount required to pay the salaries of inspectors and where the excess is diverted to non-inspection purposes. Mr. Justice Lamar says, page 563:

> "The Constitution prohibits a State from regulating interstate commerce, but at the same time authorizes the collection of necessary expenses of its inspection laws, with the result that interstate commerce is to that extent lawful burden. Inspection is intended to determine the weight, condition, quantity and quality of the merchandise to be sold within or beyond the State's borders. It is usually capable of looking out or measuring the thing to be inspected, though there may be cases in which some degree of supervision or policing is required in order to secure the proper certificate of the property intended for sale or shipment. But while the two duties may sometimes overlap, there is a difference between police and inspection, and if the State imposes upon one set of officers the performance of the two duties and pays the whole or a part of the joint expenses out of inspection fees, it must be made to appear that such tax does not materially exhaust the cost of inspection, the burden in such cases being on those seeking to collect the combined charge, for if the cost of inspection is so intermingled with other expenses as to make it impossible to separate the two, interstate commerce might be burdened by fees collected both for inspection and revenue, for a lawful and unlawful purpose. Such is the contention here, the plaintiffs insisting that the fees are collected partly for inspecting oysters and partly for policing the waters of Chesapeake Bay."

The Maryland law provided that the money should go to the fish and oyster fund, and only be drawn upon "for the purpose of maintaining sufficient and proper police regulations for the protection of fish and oysters in the Maryland waters, in the payment of officers and men and keeping in repair and supplying the necessary means of sailing the boats and vessels of the State Fisheries force. The Maryland statute, however, provided for the appointment of twenty special inspectors, requiring them to inspect all oysters in the district, to give a certificate of inspection. Even in this case it was held the law was unconstitutional.

In the case of *Red Seal Oil Manufacturing Co. vs. Board of Agriculture of North Carolina*, 222 U. S., 380; 56 L. Ed., 240, a law was sustained as an inspection law requiring kerosene and illuminating oils to be inspected. A charge of ½ cent per gallon is fixed. The court held in this case that the requirement by the legislature that the illuminating oil must be safe, pure, and form a satisfactory light establishes a sufficient primary standard and remitting to the proper State board the establishment of rules and regulations to determine what oil measures up to those standards does not amount to a delegation of legislative power, but we have in this case again a standard set. We do not see how you could have an inspection law without having a standard set that the goods must measure up to.

We think that the law in question is clearly a privilege tax. In fact, it seeks to keep any foreigners from doing the wholesale fish business, or any corporation in which foreigners have stock. This section of the law

has already been questioned and declared unconstitutional by the Texas Court of Civil Appeals of San Antonio in the case of *Coon vs. Miller et al.*, 234 S. W. 573, holding that in so far as this license law denies an alien a license to engage in business as wholesale fish dealer, and Penal Code, Article 117, making it a crime to be a wholesale dealer without having procured a license, is invalid, being contrary to the Constitution of the United States.

The Texas law has, in effect, been declared not to be an inspection law by the Supreme Court of Texas in the case of *Adams Fish Market vs. Sterrett*, 106 Texas, 562. In this case mandamus was sought to force the issuance of a wholesale fish dealer's license to complainant. There was some dispute as to what the word "handle" meant. The court then discusses whether or not the tax can be computed upon the quantity purchased without the State, and says:

> "It is our opinion that the tax may not be levied or computed upon the quantity purchased without the State. It is, of course, true that articles of merchandise brought from one State, at rest within the State, and enjoying the protection of its laws, are taxable as is other property there situated; but the tax computed upon a quantity of merchandise purchased from dealers in another State, to be transported within the State, amounts practically to a tax upon the purchase, that which gives the transaction its character as commerce, since in such case the amount of the purchase becomes the measure of the tax and would therefore constitute a burden

> upon interstate commerce, which is without the power of the State to interpose."

The court then goes on to say:

> "The proper measure of the tax, according to the statute, is, in our opinion, the quantity of fish and oysters purchased within the State and, in addition, the quantity sold within the State of any amount acquired from without. In this way the quantity handled within the State may be fairly computed and is made a subject of the tax laid by the State."

In other words, from the reading of this opinion, it is clear that the court recognizes that the tax is not an inspection tax, because if it was it would not constitute a burden on interstate commerce, and the finding that it constitutes a burden on interstate commerce is, in effect, a finding by the Supreme Court of Texas that the tax is not an inspection tax.

We believe from the above authorities that we have established that to be an inspection tax the law must set up some standard of inspection and provide a method of inspection, outlining the duties of inspectors and appointing inspectors. None of these things are done by the Texas act, and, in addition to that, the Texas act, in its caption, shows that it is an act for the protection of the fish and oyster industry and does not mention the word inspection. In fact, the Supreme Court of Texas has held that the tax would be unlawful as to interstate commerce. It would also be unlawful as to foreign commerce, even more clearly, because the

Constitution says that no tax can be levied except an inspection tax. The right to import includes the right to sell, and if all of the fish sold by appellant are fish that are imported, the tax is clearly void as to him.

Conclusion.

We respectfully submit that the case should be reversed and respondent enjoined, as prayed for in bill of complainant.

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